RICHARD G. MANSFIELD

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

AT THE

APRIL AND JULY SESSIONS OF 1880.

GEORGE H. SMITH.
REPORTER.

Volume 55.

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PREFACE

THIS is the first volume of California Reports made up wholly of cases decided by the Supreme Court as organized under the New Constitution (adopted in 1879). Of the cases reported in Volume 54, those appearing in the first part of the volume, ending with page 83, were decided by the former Supreme Court, consisting of Chief Justice WM. T. WALLACE, and Associate Justices JOS. B. CROCKETT, AUGUSTUS L. RHODES, ADDISON C. NILES, and E. W. MCKINSTRY. The rest of the cases were decided by the present Court, the organization and powers of which are prescribed by section 2 of article vi of the New Constitution of California, which reads as follows:

"Section 2. The Supreme Court shall consist of a Chief Justice and six Associate Justices. The Court may sit in departments and in bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The Chief Justice shall assign three of the Associate Justices to each department, and such assignment may be changed by him from time to time. The Associate Justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves or as ordered by the Chief Justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the Court in bank. The presence of three Justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three Justices shall be necessary to pronounce a judgment. The Chief Justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the Court to be heard and decided by the Court in bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be

made within thirty days after such judgment, and concurred in by two Associate Justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four Justices may, either before or after judgment by a department, order a case to be heard in bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the Chief Justice, in writing, with the concurrence of two Associate Justices. The Chief Justice may convene the Court in bank at any time, and shall be the Presiding Justice of the Court when so convened. The concurrence of four Justices present at the argument shall be necessary to pronounce a judgment in bank, but if four Justices, so present, do not concur in a judgment, then all the Justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four Judges shall be necessary. In the determination of causes, all the decisions of the Court in bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The Chief Justice may sit in either department, and shall preside when so sitting, but the Justices assigned to each department shall select one of their number as presiding Justice. In case of the absence of the Chief Justice from the place at which the Court is held, or his inability to act, the Associate Justices shall select one of their own number to perform the duties and exercise the powers of the Chief Justice during such absence or inability to act."

At the first election under the New Constitution, the Chief and Associate Justices whose names appear in this and in the 54th volume were elected, and upon the organization of the Court, Justices McKINSTRY, McKEE, and ROSS, were assigned by Chief Justice MORRISON to Department One, and Justices THORNTON, MYRICK, and SHARPSTEIN, to Department Two; and Justices McKINSTRY and THORNTON were selected by their respective departments as Presiding Justices.

It may be added that the Constitution also abolished the District Courts, County Courts, and Probate Courts, and created in their stead a Superior Court in each county, consisting of one or more Judges. The names of the first elected Judges of the Superior Courts are enumerated in Volume 54, California Reports.

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APRIL SESSION, 1880.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT,

APRIL SESSION, 1880.

[No. 7,049.—Department No. 2.]

ROWLAND *v.* COYNE ET AL.

APPEARANCE.—In an action against several defendants—one of whom had not been served with summons—a demurrer was served and filed, beginning with the words, "And now come the defendants, etc.," and signed C. P. & S., "attorneys for defendants": *Held*, that this was an appearance of all the defendants under the express provisions of the Code. (Code Civ. Proc. § 1014.)

CHANGE OF PLACE OF TRIAL—AFFIDAVIT OF MERITS.—Upon a motion to change the place of trial, in an action against a Sheriff and his sureties, on the ground that the action was not brought in the proper county: *Held*, that the affidavit of merits (quoted in the opinion) was sufficient; and also, that it was not necessary for affidavits to be filed by the other defendants.

APPEAL from an order changing the place of trial, in the Superior Court of Los Angeles County. SEPULVEDA, J.

The facts are stated in the opinion.

Graves & Chapman, for Appellant.

Tasker had not appeared, and was not entitled to move for a change of place of trial. If the action be commenced in the wrong county, it may, nevertheless, be tried there, unless the defendant, at the *time* he answers or demurs, files an affidavit of merits, and demands in writing that the trial be had in the proper county. (Code Civ. Proc. § 396.) The intent of the

statute is that, before the party shall be permitted to object, he must submit himself to the jurisdiction of the Court.

An appearance in general terms for the defendants will be confined to those defendants who have been served with process. (*Chester* v. *Miller*, 13 Cal. 561; *Miller* v. *Ewing*, 8 Smedes & M. 421; *Dean* v. *McKinstry*, 2 id. 213; *Edwards* v. *Toomes*, 14 id. 76; *Torry* v. *Jordan*, 4 How. (Miss.) 401.)

There was no affidavit of merits on the part of any defendant, except Coyne, and the motion should have been denied for that reason. (Code Civ. Proc. §§ 396, 17.) The statute means, that where there are several defendants, they must all comply with the conditions. The purpose of the statute, in requiring the affidavit, is not to convince the Court that there is a good defense, but is to show the good faith of the moving parties.

The affidavit is also insufficient, because it does not state that the defendant *believes* that he has a good defense, but only that he believes that his counsel so informed him. (1 How. Pr. 60; Id. 162.)

Levi Chase, *E. Parker*, and *Will. M. Smith*, for Respondents.

The statute was complied with in all respects. The affidavit of merits by Coyne was sufficient for all the defendants. No judgment could be recovered against the sureties without a recovery against the principal. His defense is necessarily a defense for all. But though it were not sufficient for the sureties, it was sufficient for Coyne. Each defendant had the right to change the place of trial; and the waiver of all the others could not prejudice or destroy his right. (*O'Neil* v. *O'Neil*, 54 Cal. 187.)

THORNTON, J.:

This action was brought in the Superior Court for the County of Los Angeles, against Joseph Coyne, the Sheriff of the County of San Diego, and the sureties on his official bond, to recover damages for an alleged breach by the Sheriff of the conditions in the instrument last named. Service of summons was made on all the defendants to the action in the County of San Diego, except Joseph Tasker, one of the sureties above referred to.

The action was commenced on the 6th of January, 1880, and on the 28th of the same month a demurrer was served and filed by Chase, Parker, and Smith, who signed the demurrer as "attorneys for defendants." The demurrer begins as follows: "And now come the defendants in the above entitled action, and for demurrer to," etc.

At the same time that this demurrer was filed and served, a demand in writing, that a trial of the case should be had in the County of San Diego, was served and filed by the above-named attorneys, on behalf of all the defendants, and an affidavit of merits was made by Joseph Coyne, and also an affidavit that all the defendants were, when the action was commenced, residents of the County of San Diego, and that no one of them resided in the County of Los Angeles; that Tasker was not, at that time, in the County of San Diego, but was then, and still is, temporarily living in the Territory of Arizona.

The plaintiff did not comply with the demand, and on the same day on which the demand and affidavit of merits was filed and served, a notice was served on the attorney for plaintiff by the attorneys above mentioned, on behalf of all the defendants, that on the 2nd of February, 1880, a motion would be made, on the papers above mentioned, and on the pleadings and papers on file in the action, to change the place of the trial of the cause from the County of Los Angeles to the County of San Diego. This motion came on regularly to be heard, at which time those affidavits were read on the motion, which it is unnecessary, in the view we take of the cause, to refer to further. The Court granted the motion, to which an exception was taken, and from the order granting this motion this appeal is prosecuted.

It is contended that Tasker had made no appearance in the action, and was not entitled to move for a change of the place of trial. We have seen that certain attorneys regularly demurred to the complaint for all the defendants. This is an appearance under the express provisions of the Code. (Code Civ. Proc. § 1014.) The case of *Chester* v. *Miller*, 13 Cal. 561, cited by counsel for plaintiff, has no bearing on this question. The remarks of the Court in that case, in regard to the meaning of a recital of appearance by defendants, referred to a recital in the docket of a Justice of the Peace. We must hold the above

an appearance of Tasker, or repeal the statute. The latter we cannot do.

It is argued that the affidavit of merits is insufficient. It is as follows:

"Title of Court and Cause. Affidavit of Joseph Coyne. Joseph Coyne, being first duly sworn, on oath says: I am the principal defendant in this action, and have a personal knowledge of the matters to be put in issue therein. That I have fully and fairly stated the facts in this case to my counsel, Levi Chase, E. Parker, and Will. M. Smith, and after said statement they informed me that I had a good and valid defense upon the merits to said action, and to all of it, all of which I verily believe to be true. JOSEPH COYNE.

"Subscribed and sworn to before me, this 27th day of January, 1880. GILBERT RENNE,

"[Notarial Seal.] Notary Public."

The criticism is, that the affiant Coyne swore to the fact only that his counsel *informed* him that he had a good and sufficient defense, etc. We do not so construe the affidavit. Coyne, in our opinion, deposed to the fact that he was informed by counsel as he states, and further, that he then believed all of it. The affidavit is sufficient.

There is nothing in the objection that the affidavit of merits was made by one of the defendants only. It was used on behalf of all. If Coyne, the Sheriff, had a defense on the merits, it followed that the defendants, his sureties, had the same.

We find no error in the record. The order was properly made, and is affirmed.

SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 6,528.—Department No. 2.]

WILSON *v.* MADISON ET AL.

ACTION TO QUIET TITLE--PUBLIC LAND—PRIOR POSSESSION.—In an action to quiet title, brought by the grantee in a constable's deed made upon an execution sale, in an action against one in possession of the land, it appeared from the plaintiff's evidence that the land was public land, and the Court granted a nonsuit on that ground. *Held*, that the Court erred; that the defendant, having shown no title whatever, could not rely upon an outstanding title in the United States.

ID.—ID.—ID.—The legislation of the State from the beginning has treated the possession of public land as legal, and as vendible under execution, and has protected the title of the purchaser.

SHERIFF'S DEED.—It may be regarded as settled in this State that the misrecital of the execution in an officer's deed will not affect the validity of the deed, if the officer had authority to sell.

ID.—RETURN ON EXECUTION.—The title of a purchaser at an execution sale does not depend on the return on the execution.

CROSS-COMPLAINT—ACTION TO QUIET TITLE.—In an action to quiet title, where the defendant relies upon title in himself, a cross-complaint is unnecessary; and, if one is filed, it will not entitle the defendant to have the issues arising thereon first tried.

APPEAL from a judgment for the plaintiff, in the Eighteenth District Court, County of San Diego. MCNEALY, J.

The facts are stated in the opinion.

W. Jeff. Gatewood, *Thos. P. Slade*, *A. B. Hotchkiss*, and *F. Ganahl*, for Appellant.

It is conceded that the title to the land is in the United States, but the plaintiff claims that that fact does not preclude him from the remedy invoked in this suit under Code of Civil Procedure, § 738. (*Pierce* v. *Felter*, 53 Cal. 18; *Stoddart* v. *Burge*, id. 394; *People* v. *Moore*, 12 id. 70.) It does not vitiate the deed that the execution is erroneously recited. (*Blood* v. *Light*, 38 Cal. 659; *Hunt* v. *Loucks*, 38 id. 372.)

Chase & Leach, for Respondent.

THORNTON, J.:

James Wilson sued the defendants in the District Court for the County of San Diego, to quiet his title to a tract of land situate in that county. The defendant Madison answered and

set up a cross-complaint, to which pleading last-mentioned plaintiff filed an answer. The defendant Tull suffered a default. When the plaintiff rested his case on the complaint, on motion of defendant Madison, the Court ordered a nonsuit, and from the judgment of nonsuit plaintiff brings an appeal to this Court.

The case was tried by the Court, a jury having been waived, and the plaintiff, to sustain the issues on his part, introduced the following evidence: The record from a Justice's Court from Agua Caliente Township, County of San Diego, brought by one W. J. Gallaspy against A. Hatfield on a promissory note, summons with return of service on defendant, demurrer of defendant by attorney, and a judgment in favor of plaintiff and against defendant for the sum of $28.50 and costs. This judgment was rendered and entered on the 6th of November, 1876, and on the same day, as appears from the testimony, an execution in due form of law was issued, which came to the hands of Thomas Bundy, constable, on which the following return was made:

"Received on the within execution the sum of $78\frac{75}{100}$ for 3,600 pounds of potatoes at $\frac{1}{2}$ cent, bid in by D. D. Bailey; and for 267 bushels of charcoal at 3 cents per bushel, bid in by D. D. Bailey; and for 20,000 pounds of hay at $\frac{1}{4}$ cent per pound, bid in by W. N. Shaw. Received on the within execution $120 for the ranch advertised and sold to James Wilson on the 18th day of December, 1876. Total received on the execution, $198\frac{75}{100}$. Total amount due on the execution, $207\frac{75}{100}$. Balance due on the execution, $9\frac{30}{100}$. This, the 10th day of December, 1876. THOS. BUNDY, Constable."

The plaintiff also offered in evidence a certificate of sale of the property in controversy issued to him by the constable, bearing date the 18th of December, 1876, and a deed executed by the same officer to him on the 21st of June, 1877. These two documents just mentioned contain the following recitals: That by virtue of an execution in the action above entitled, (*Gallaspy* v. *Hatfield*) tested the 18th day of December, 1876, by which he was commanded to make the amount of five dollars and 30-100ths to satisfy the judgment in said action, with costs thereon, out of the personal property of A. Hatfield, the defendant in said action, and if sufficient personal property could not be

found, then out of the real property belonging to said Hatfield, on the 6th day of November, 1876, or at any time thereafter, as by the said writ more fully appears, he has levied on and this day sold at public auction, according to the statutes, etc., to James Wilson, who was the highest bidder therefor, for $120, the real estate, describing it.

Thomas Bundy, the constable, was called, and testified that he levied the execution produced. The return to it was written according to his orders and instructions.

It is sufficient to say, without stating it here, that the testimony of Bundy, Monroe, Ijams, and the plaintiff, at least tended to show that the land levied on under execution, and conveyed by the deed, was the same land sued for.

It appears that the plaintiff, for the purpose of identifying the land sued for with the lot sold under execution, offered in evidence a declaration of homestead in legal form by A. Hatfield, the defendant in execution.

The plaintiff rested, and defendant moved for a nonsuit, on the ground that the plaintiff had failed to show any title, or right, or interest in the property in controversy, and had failed to make a case upon which the Court could enter judgment in his favor. The Court granted the nonsuit, and "assigned as a reason therefor, that allowing all the testimony offered on the part of the plaintiff, it appeared that he had no right, title, interest, or estate in the premises in controversy, as the title was in the United States Government, and therefore could not maintain this suit, and that it was unnecessary to determine the other points of the motion." The plaintiff excepted to the order granting a nonsuit, and appeals from the judgment entered upon it.

The Court erred in its ruling. We see no ground upon which the defendant could rely upon an outstanding title in the United States. He has shown no privity with Hatfield, the judgment debtor, or any title whatever. The legislation of this State from the beginning has treated such possessions as that of Hatfield as legal and vendible under execution, and has protected the title of the purchaser, regardless of the fact that the land in controversy is really public land. The statutes passed with that view have been in harmony with the legislation of the Congress

of the United States. So far as the case proceeded on the trial, the Court could not see that the defendant was anything more than a mere trespasser. Under the circumstances he should not have been allowed to set up the title in the United States. The evidence admitted showed a case in which the plaintiff had a right to recover, and we cannot see in any point of view that the judgment of nonsuit can be sustained.

An objection is made that the execution is issued on the 6th day of November, 1876, and that it appears from the recital in the constable's deed that the sale was made under an execution issued on the 18th of December, 1876. This is obviously a mistake by the officer. The execution is identified by him in his testimony. There was but one execution produced on the trial. He, the officer, testified: "I levied the execution produced." "I acted under this execution."

The execution was tested and gave authority to sell, and it may be regarded as settled in this State that a misrecital of the execution in the officer's deed will not affect the validity of the deed if the officer had authority to sell. (*Blood* v. *Light*, 38 Cal. 659; *Hunt* v. *Loucks*, id. 382.)

The return on the execution shows a sale by the constable. The deed recites a levy, which is sufficient. (*Blood* v. *Light*, 38 Cal. 658, and cases there cited.) But, as was said in *Hunt* v. *Loucks*, 38 Cal. 383, "Whether the return be good or bad, sufficient or insufficient, is a matter of no moment to the purchaser, for his title depends on it in no respect whatever." (*Ritter* v. *Scannell*, 11 Cal. 238.)

A cross-complaint to quiet his title against plaintiff was filed by defendant in this case, to which an answer was put in by plaintiff, and a motion was made by the plaintiff that the issues arising on the cross-complaint and answer to it be first tried. The Court refused, and to this plaintiff excepted.

We see no error under the circumstances of this case in such refusal. In fact, we can see no necessity for a cross-complaint. Issue was joined on title by the complaint of plaintiff, and defendant's answer thereto, and if judgment passed for defendant, it would be an estoppel as to the title, which, under the rulings of the Supreme Court of California, would protect the defendant as well as a decree in his favor.

Judgment reversed, and cause remanded for a new trial.

SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 6,942.—Department No. 1]

WITHERBY *v.* THOMAS.

NEW TRIAL—CONFLICT OF EVIDENCE.—The evidence in the case held to be conflicting.

INSTRUCTIONS—CONFLICTING INSTRUCTIONS—REFUSAL OF INSTRUCTIONS.—Certain instructions, discussed by the Court, *held* not to be conflicting, and others *held* to have been properly refused.

EVIDENCE—INCREASE OF CATTLE.—Certain testimony held to be admissible.

APPEAL from a judgment for the plaintiff, in the Eighteenth District Court, County of San Diego. SEPULVEDA, J.

It appeared, from the evidence on both sides, that after the termination of the first contract, referred to in the opinion, the increase of the cattle were not divided, but all the cattle remained together until the termination of the second contract; that upon sales of cattle, pending the contract, and upon the final division of the cattle at its termination, the plaintiff claimed to be entitled to one-half of all the increase, including the increase of the increase belonging to the defendant under the first contract, and received that proportion of the cattle divided, and of the proceeds of the cattle sold as reported by the defendant; but the plaintiff claimed that the defendant had not reported all of the cattle, but had fraudulently disposed of some of them, and that others were lost by his negligence.

The defendant, in his answer, set up a counter-claim for the excess of cattle, and of the proceeds of cattle received by plaintiff over his share.

The second instruction, referred to in the opinion as being refused by the Court, is as follows:

"2nd. The contract of August 26th, 1875, is, therefore, to be construed as being a contract for keeping Witherby's share of the contract only, to wit; the original stock, and an undivided half of the increase thereof, on the 1st day of May, 1875, upon

the terms specified in said contract, and does not include or refer to the undivided half of the increase of the cattle belonging to Thomas.

The other facts are stated in the opinion.

Glassell, Smith & Smith, for Appellant.

The third instruction, given at the instance of plaintiff, was clearly erroneous, and was in effect an instruction to find for the plaintiff upon the main point involved. (*Black* v. *Sprague*, 54 Cal. 266.)

The Court erred in refusing to give the second instruction asked by the defendant. (*People* v. *Ramirez*, 13 Cal. 172; *Conroy* v. *Duane*, 45 id. 608; *Lightner* v. *Menzel*, 35 id. 459; *People* v. *Williams*, 32 id. 284.)

Chase & Leach, and E. Parker, for Respondent.

The third instruction clearly states the contract as claimed by the defendant.

The principle stated in the third instruction, asked by the defendant and refused by the Court, was clearly announced in the other instructions given by the Court. Defendant could not claim more than one-half of the increase of the original stock, and one-half of the increase from plaintiff's half of the increase due from the defendant. The Court so instructed the jury.

No objection was made to the evidence of the witnesses Manasse and Parker, as to what the increase of cattle ought to be. Their testimony, as to what numbers ought to have been on hand at the expiration of the first contract, was but a computation made by them, based upon facts already before the jury.

MORRISON, C. J.:

This is an action upon two promissory notes, executed by defendant and payable to plaintiff. The execution of the notes is not denied, but defendant sets up in his amended answer and cross-complaint two contracts entered into between the parties to the action, one of which bears date May 8th, 1870, and the other the 26th day of August, 1875.

The first of these contracts recites, that the party of the first part (plaintiff) has furnished and delivered 363 head of cows to the party of the second part (defendant) for the term of five years, the same to be kept and taken care of by defendant, and at the expiration of the period of five years to be redelivered to the plaintiff, "together with one-half of the increase."

The second contract, after referring to the first, and enumerating the number of cattle delivered the defendant thereunder, proceeds as follows: "And whereas, the term for which said stock was let having expired, both parties wish to renew the same contract and extend the time thereof: Now, therefore, it is hereby agreed between the parties hereto, that the party of the second part shall keep and retain all of the original stock, and the increase thereof now due from him to the party of the first part, for the term of five years from this date, or until the same are disposed of by the party of the first part, upon the same terms and conditions upon which the stock was originally taken, to wit, for one-half the increase thereof; it being distinctly understood that the party of the first part has and retains the right, at any and all times, to sell any or all of the original stock, or any or all of his share of the increase thereof at his pleasure."

Several matters constituting counter-claims are set up in defendant's answer and cross-complaint, arising out of alleged sales by plaintiff of stock in which the defendant was interested as part owner, the payment of taxes, and other matters particularly set forth in the pleading. All of the matters contained in defendant's cross-complaint are fully answered and denied by the plaintiff. The jury found in favor of the plaintiff for the amount of the two promissory notes with interest, and plaintiff had judgment therefor. Defendant made a motion for a new trial, which was denied, and this appeal is taken from the judgment and order of the Court below denying defendant's motion for a new trial.

1. The first point made on the appeal is, that the verdict was contrary to the evidence. It is sufficient for the Court to say, in disposing of this point, that there was a substantial conflict in the evidence, and in such cases it is well settled that we will not disturb the verdict. The case was peculiarly one for the

jury to pass upon, as it included many questions of fact, in relation to some of which the witnesses testified to *chances and probabilities*, rather than to positive facts. This was notably so when witnesses were called on behalf of the plaintiff to testify to the probable rate of increase, and other witnesses were called on the part of the defendant to testify to the number of the cattle that had probably died.

2. The second point made by defendant is, that the third instruction given by the Court was erroneous. The following was the instruction complained of:

"Third.—That the contract of August 26th, 1875, was in effect a continuation of the contract of 1870, previously existing between the parties concerning said property, and you will examine said contract of 1870 in connection with that of 1875, and in reading them together will give to them the same effect as the first made would have had, had it been made for ten years, with the reservation to plaintiff of the right of sale of said property contained in said agreement of 1875, and that the defendant, under the agreement of 1875, was to keep and retain all of the original stock and the increase thereof that was due from the defendant to plaintiff for the term of five years upon the same terms and conditions upon which the stock was originally taken, to wit, one-half of the increase thereof."

This instruction may be subject to criticism as being somewhat vague and possibly inconsistent, for it was not strictly accurate to say that the contract of 1875 was in effect a continuation of the contract of 1870. When the contract of 1870 was entered into, there had been no increase, and each party was entitled to one-half of the increase thereafter accruing; but when the contract of 1875 was made, the defendant was entitled to *one-half of the increase existing at that time*. When, therefore, the contract of 1875 was made, the increase to be thereafter divided between the parties was not the increase of the entire stock, but simply the increase of the original stock and the increase of the one-half of the increase belonging to plaintiff. This may be gathered from the language of the instruction as the meaning of the Court, "that the defendant, under the agreement of 1875, was to keep and retain all of the original stock and the increase thereof that was due from the defendant to the

plaintiff for the term of five years upon the same terms and conditions upon which the stock was originally taken, to wit, one-half the increase thereof."

This did not include any portion of the increase belonging to the defendant at the time the contract of 1875 was made, and was, therefore, correct.

But whatever uncertainty there was in the foregoing instruction was removed by the following instruction, which was also given by the Court:

"In the agreement of August 26th, 1875, it was agreed that Thomas should keep and retain all of the original stock, *and the increase thereof due from Thomas to Witherby*, for the term of five years from that date, or until the same were disposed of by Witherby, upon the same terms and conditions upon which the stock was originally taken, to wit, for one-half of the increase thereof."

This was certainly the import of the agreement of August 26th, 1875, clearly and distinctly stated to the jury. We are, therefore, of the opinion that the jury could not have been misled, and the defendant could not have been prejudiced by any apparent conflict found in the third instruction.

3. The next error assigned is in the refusal of the Court to give the second and third instructions asked by the defendant. In answer to this, it is sufficient to say that the third instruction did not contain a correct statement of the law, and the second instruction was fully covered by the instructions given and referred to above.

4. The fourth error alleged is, that the Court erred in giving the fourth and fifth instructions asked by the plaintiff. The fourth instruction merely relates to the degree of care the defendant was required to exercise in keeping the stock, and was correct. The fifth instruction was to the effect that the defendant was required to account for all the original stock received by him from the plaintiff, and the increase thereof, and was, in our opinion, properly given.

5. It is claimed by the appellant that the Court erred in giving the following instruction to the jury:

"2nd. That under said contract the defendant is not entitled to recover for keeping and taking care of said property prior to

the time that said property was finally divided and turned over to plaintiff and said business venture was closed, unless the jury find from the evidence that after entering into said contract the said parties entered into another contract, fully terminating the one previously made, and releasing defendant from his original obligation."

It was not contemplated by the terms of the first or second contract that the defendant should receive any pecuniary consideration for keeping the cattle, and unless a new contract was made, imposing upon the plaintiff the obligation of paying the defendant such compensation, none existed. The instruction was therefore correct.

6. The next error assigned is, that the Court erred in refusing to permit the defendant to amend his answer. The transcript shows (fol. 115) that on the trial the defendant moved the Court for leave to amend his answer, to which plaintiff objected unless terms were imposed, and thereupon defendant stated that he would rather withdraw the motion than have it granted on terms, "*and thus the matter ended.*" There was no ruling of the Court on the subject, and no exception taken.

7. The seventh and last point presented on this appeal is, that the Court erred in overruling defendant's objection to the evidence of Manasse and Parker. The witness Manasse and one Cassidy were experienced stock-raisers, and were called to testify to the usual increase of cattle in that part of the country; and they did testify what, as a general rule through good and bad years, such increase would be. To this evidence no objection was interposed, and then the witness Manasse was asked the following question:

"According to the usual rate of increase and loss, how many, if any, cattle would there have been remaining after the sale last mentioned, and how many on the first of August, 1878?"

The defendant objected to the question, on the ground that such evidence was hypothetical, speculative, and delusive: that it had no tendency to prove the number of cattle actually on hand at the dates mentioned, or to show any breach of contract or negligence on the part of defendant. The Court overruled the objection, and the defendant excepted. The witness answered that he had figured upon that data—the data already given by him—and stated the result.

It was simply an arithmetical calculation made by the witness, the correctness or incorrectness of which could have been tested by any one familiar with figures, and therefore could not, in our opinion, have worked any injury to the defendant. The same may be said of the evidence of the witness Parker.

We have now examined all the points made on the appeal, and failing to find any substantial error in the proceedings in the Court below, the judgment and order are affirmed.

McKEE, J., and ROSS, J., concurred.

[No. 6,909.—Department No. 1.]

ALEXANDER *v.* BOUTON ET AL.

MARRIED WOMEN—CONTRACT—PROMISSORY NOTE—MORTGAGE—PRINCIPAL AND SURETIES.—The appellant, to secure the debt of her husband, joined with him in a note, and in a mortgage upon her separate property—having been induced to do so by the representations of her husband that she was to be liable only to the extent of the mortgaged property. The plaintiff also took a collateral agreement from others, to secure any deficiency that might remain after the sale of the mortgaged property; but the defendants were not parties to this agreement. *Held*—in an action to foreclose the mortgage, that the appellant was bound as principal, and that her liability was not affected by the understanding she had with her husband, or by the additional security taken by the plaintiff; and *held further*, that she was liable for any deficiency that might arise upon the sale of the mortgaged premises, and that judgment might be docketed against her for it.

ID.—ID.—ID.—A married woman, except in relation to her separate property, is, in this State, under a disability to contract; but, as to her separate property, she is considered as a *femme sole*, and may make any contract with relation to it; and where a married woman executes a note, and a mortgage upon her separate property, the promise to pay is to be construed as relating, not only to the mortgaged premises, but to her separate property generally.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The facts are stated in the opinion.

Brunson & Wells, for Appellant.

The decree ordering the docketing over of a judgment against appellant, for any deficiency remaining unpaid after the sale of the mortgaged premises, is in direct conflict with the terms of the contract set forth in the answer and proven on the trial.

The contract of Griffith & Crawford, to pay such deficiency, was made contemporaneously with the note and mortgage, and was part and parcel of the same transaction. The appellant consented to furnish the mortgaged property, with the understanding that she incurred no liability, except to furnish this security.

Without reference to this understanding, the appellant being a married woman, and the liability not being her own debt, or a debt contracted for her use or benefit, or for the benefit of her separate estate, she is not liable for any balance remaining unpaid, after the sale of her lands, on the mortgage foreclosure. (Civ. Code, §§ 1556, 158, 171; *Maclay* v. *Love*, 25 Cal. 367; *Smith* v. *Greer*, 31 id. 477; *Terry* v. *Hammonds*, 47 id. 35; *Drais* v. *Hogan*, 50 id. 121; *White* v. *McNett*, 33 N. Y. 376.) This is not her separate debt, so as to make her or her property liable under § 171, Civ. Code, beyond the particular property mortgaged; and the provisions of that section expressly exempt her from any liability for the debts of her husband. (*Shartzer* v. *Love*, 40 Cal. 93; *Willard* v. *Eastham*, 15 Gray, 328, 385; *Heburn* v. *Warner*, 112 Mass. 271; *Yale* v. *Dederer*, 22 N. Y. 451; *Payne* v. *Burnham*, 62 id. 69; *Gorman* v. *Cruger*, 79 id. 87; *Williams* v. *Hayward*, 117 Mass. 532; *Thacher* v. *Churchill*, 18 Mass. 108; 1 Jones on Mort. § 110; *Kidd* v. *Conway*, 65 Barb. 158; *Brown* v. *Orr*, 29 Cal. 122; *Corn Exchange Ins. Co.* v. *Babcock*, 42 N. Y. 613.)

Thom & Stephens, for Respondent:

Upon the last point, cited *Wood* v. *Oxford*, 52 Cal. 412; *Parry* v. *Kelley*, id. 334; *Marlow* v. *Barlew*, 53 id. 456.

McKEE, J.:

Defendants in the Court below, on the 1st of September, 1877, made the promissory note and executed the mortgage which constitute the subject-matter in controversy in this case.

The defendant, E. Bouton, since the execution of the note and mortgage, has been adjudicated a bankrupt. As a defense to the action, the defendant, Margaret, in her answer to the complaint, alleges that, at the time of the execution of the mortgage, she was a married woman and the wife of the codefendant; that her husband was at that time in debt; and for the purpose of enabling him to borrow money from the plaintiff to pay his indebtedness, she became security for him to the extent of her separate property; that of the money which her husband received from the plaintiff she had had no portion; but that her husband received and applied it all to the payment of his debt. No portion of it was applied to her use and benefit, or to the use and benefit of any of her separate property; that the plaintiff knew that she signed the promissory note only as a surety, and with knowledge of that fact had taken an agreement in writing from others to pay any deficiency in case the mortgaged premises should, after foreclosure and sale, prove insufficient to satisfy the mortgage debt; and that, in consideration thereof, the plaintiff agreed to release her from any judgment for insufficiency.

At the trial the promissory note and mortgage were offered in evidence. The one was signed by the husband and wife, and the other was also executed by them in the mode prescribed by law. By the promissory note both, jointly and severally, promised to pay to the plaintiff, or to her order, the sum of $2,000, one year after date, with interest at the rate of one per cent. per month, etc. By the mortgage both also jointly and severally covenanted to pay to the plaintiff the promissory note when it became due, and all assessments and liens which might be laid or imposed upon the mortgaged property during the existence of the mortgage.

It does not appear by the promissory note or mortgage that the mortgaged premises were the separate property of the wife; but, at the trial of the case, the wife testified that they were her separate property; and the husband in substance testified that he and a friend, by representations or statements made to the wife, induced her to consent to mortgage her property, for the purpose of enabling him to borrow the money from the plaintiff, and that she signed the promissory note and executed the mort-

gage with the understanding that she was only to furnish the security, and incur no personal liability. It also appears, by the testimony of the husband, that when he received the money from the plaintiff, he applied it to the payment of a debt which he owed jointly with one Crawford; that no part of the money went to his wife, nor was any of it applied to her use or benefit, or used for the betterment of any of her separate property. The testimony also shows that the agent of the plaintiff refused to make the loan to the defendants upon the security which they offered, unless other parties would agree to pay any deficiency which might remain after a foreclosure sale of the mortgaged property. Parties who were friends of the defendants, thinking that the security was perfectly good, agreed in writing with the plaintiff to that effect. But the agreement was made solely with the plaintiff. The defendants were not parties to it; nor was it made for their benefit or for the benefit of either of them; and the plaintiff made no promise or agreement with the defendants or either of them, that in consideration of that agreement, she would release the defendant Margaret from a judgment for such deficiency.

We think it is evident that the defendant Margaret was not induced to join her husband, in making the contract with the plaintiff, by anything which was said or done by the plaintiff or by her agent; neither participated in any of the statements or representations which were made to her by her husband, nor did either of them know that such statements had been made. After having been persuaded by her husband, the defendant consented to join him in the transaction as a surety, and to mortgage her separate property for that purpose; and when she signed the note and executed the mortgages, she *believed* that she was doing so as a surety for her husband. But neither she nor her husband so informed the plaintiff or her agent. Nor did either of them know that she joined her husband in making the contract otherwise than as a principal. It is true the plaintiff dealt with her as a married woman; that fact was known to the plaintiff and her agent, for the mortgage itself revealed it. But when a married woman makes a contract with another, which she is authorized by law to make, the legal presumption is that she contracts as a principal; and, in an action at law, or in

equity, with reference to it, if she contracted otherwise than as a principal, it is incumbent upon her to prove it; for as she possesses by law all the rights, she is subject to all the duties, of a contracting party.

As a principal, then, the defendant Margaret became bound by her contract with the plaintiff, if she had capacity to make it at all.

A married woman unconnected with separate property of her own is, in this State, under disability to contract. She may hold property jointly with her husband, in community, as tenant in common, or as joint tenant, but her interest in the community property she holds in subjection to her husband. As head of the family he is entitled to the management and control of such property. He may dispose of it without the consent of his wife, and it is not liable in law for any contracts which may be made by her after marriage, unless by his consent manifested according to law. It is otherwise as to the wife's separate property; that belongs exclusively to her—her husband has no interest in it. She has the absolute right to use and enjoy it and the rents, issues, and profits thereof, and to dispose of the same, by her own act and deed, without the consent of her husband. She is, as to her separate property, considered a *femme sole*, and she may make any contract respecting the same with her husband, or any one else competent in law to contract. It is primarily liable for any or all of her contracts made before or after her marriage, and to the full extent of it she is bound for the performance of the obligation which she has incurred by reason of any of them. The separate property of her husband is not liable for any of her contracts made before her marriage; the Code has especially exempted it from liability for contracts of that character. Her creditors must look, first of all, to her separate property for the satisfaction of her contracts, whether made before or after marriage.

There is no question, then, as to the validity of the defendant Margaret's contract. It is one which she made respecting her separate property as a principal, jointly with her husband, and being valid, it may be enforced against her by any of the remedies known to the law. As a *femme sole*, she may sue and be sued on her contract; and judgment may be rendered for and against

her, and be enforced by the process of courts in any action, at law or in equity, which she may bring or defend.

It was competent, therefore, for the Court below in this action to render judgment against the defendant Margaret for the amount which was due the plaintiff, and to direct a sale of the mortgaged property; and if after sale it appeared that the proceeds were insufficient, and a balance still remained due, to docket the judgment for said balance against her, according to § 726 of the Code of Civil Procedure; for, being personally liable on her contract as a *femme sole*, judgment recovered thereon becomes a lien on her separate real estate, and may be enforced as in other cases in which execution may issue. (*Marlow* v. *Barlew*, 53 Cal. 456.) Any judgment rendered against a married woman, made upon a contract respecting her separate property, may be enforced against her separate property. (*Van Maren* v. *Johnson*, 15 Cal. 311.) A partial performance of the obligation of her contract does not extinguish it. It continues to exist until it is fully performed or released, and until it is fully performed it may be enforced.

Judgment and order affirmed.

MORRISON, C. J., and MCKINSTRY, J., concurred.

[Mr. Justice ROSS being disqualified, did not participate in the decision of this cause.]

[No. 6,796.—Department No. 1.]

LONG v. SERRANO ET AL.

PARTIES—JUDGMENT BY DEFAULT.—In an action against several defendants, all of whom were served and defaulted, *held*, that the clerk had no authority to enter judgment against one only.

APPEAL by the defendant Pico, from a judgment for the plaintiff, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The action was brought upon a promissory note made by the defendants Serrano, and Bilderrain, and Pio Pico. All the de-

fendants were served and their defaults duly entered, and judgment by default was entered by the clerk against the defendant Pico.

Glassell, Smith & Smith, for Appellant:

Cited *Stearns* v. *Aguirre*, 7 Cal. 443; Code Civ. Proc. §§ 585, 414; *Chipman* v. *Bowman*, 14 Cal. 153; *Kelly* v. *Van Austin*, 17 id. 566; *Glidden* v. *Packard*, 28 id. 652; *Welsh* v. *Kirkpatrick*, 30 id. 205; *Willson* v. *Cleaveland*, id. 198; *People* v. *Evans*, 29 id. 429; Chitty on Plead. (31) (33).

Hutton & Godfrey, for Respondent, made no argument.

By the Court (from the Bench):

On the authority of *Stearns* v. *Aguirre*, 7 Cal. 443, and cases subsequently decided, the judgment is reversed and cause remanded.

[No. 7,055.—Department No. 1.]

DE LA GUERRA *v.* NEWHALL.

Pleading — Assumpsit — Common Counts — Promise — Evidence — Variance — Immaterial Error.—The promise to pay, alleged in the common counts in assumpsit, was a mere conclusion of law from the facts stated; and, under the Code, in such cases, (as it is only required to state the facts) an express promise need not be alleged, and, if alleged, need not be proved. Accordingly—where the complaint alleged the pasturing of defendant's cattle on the plaintiff's land, and the value of the pasturage; and also alleged that the plaintiff expressly promised to pay what it was reasonably worth—*held*, that it was not necessary to prove an express promise; and *held, further*—there being no conflict in the evidence as to the pasturing of defendant's cattle on the plaintiff's land—that the admission of incompetent evidence as to an express promise could do no injury, and was, therefore, not ground for reversal.

Former Judgment — Estoppel.—A judgment for defendants, in an action for the trespassing of defendants' cattle on the plaintiff's land, held not to be a bar to a subsequent action for similar trespasses, occurring prior to those alleged in the former action.

Appeal from a judgment for the plaintiff, in the First District Court, County of Ventura, (Fawcett, J.) and from an order denying the defendants a new trial in the Superior Court of the same county. Hines, J.

In the complaint in the former action, referred to in the opinion, the trespasses complained of are alleged to have occurred "upon divers days and times since said 5th day of May, 1877"; and it was admitted on the trial, that the cattle, for which pasturage is claimed in this action, are the same cattle mentioned in the complaint in the former action; and that they remained on plaintiff's land from the time they first strayed thereon, about March 21st, 1877, until the time the former action was commenced.

The statement of H. G. Newhall, referred to in the opinion, was to the effect, that as soon as Soto (one of the defendants) should come from San Francisco, he (Newhall) and Soto would pay plaintiff for all the damage which had been done by the cattle. H. G. Newhall was the son of the defendant Newhall; but it did not appear that he was authorized to act for the defendants.

The other facts are stated in the opinion.

Russell J. Wilson, *Charles Fernald*, and *Wilson & Wilson*, for Appellants, cited, on the point of estoppel, *De la Guerra* v. *Newhall & Soto*, 53 Cal. 142.

Blackstock & Shepherd, *J. M. Brooks*, and *J. G. Howard*, for Respondent.

MORRISON, C. J.:

The complaint in this action contains two counts in *indebitatus assumpsit*, the first for pasturing 1,500 head of cattle from the 20th day of March to the 5th day of May, 1877, and the second for pasturing "a large band of cattle" from the 20th day of February to the 5th day of May, 1877. Trial before a jury, and verdict for plaintiff in the sum of $900. The case is brought before this Court on appeal from the judgment and from the order of the Court below, denying defendant's motion for a new trial.

In both counts of the complaint, an *express promise* on the part of the defendants is alleged, but the evidence fails to establish an *express promise*, and this is the first point made on appeal. It is claimed on behalf of the appellants, that it was

incumbent on the plaintiff to prove an *express promise*, as such promise was averred in both counts of the complaint. Such was not the rule under the common-law forms of pleading, and is not the rule under the Code of Civil Procedure.

"No distinction exists in pleading between an implied promise and an express one; it is true that in *evidence* the law in many cases implies from certain facts that a promise has been made; but in *pleading*, the supposed promise itself should be alleged, and it is at least untechnical merely to state that which is only evidence of a promise." (1 Chitty on Pleading, 309.)

In the case of *Wilkins* v. *Stidger*, 22 Cal. 236, the Court held that "the promise to pay, alleged in the common counts in assumpsit, was a mere conclusion of law from the facts to be stated, and as the Code only requires the facts to be stated, they are sufficient without setting forth the conclusion of law arising from those facts"; and in the later case of *Abadie* v. *Carrillo*, 32 Cal. 174, the same thing was held by the Court.

In the case now under consideration, the complaint contained all the averments necessary to the creation of a legal liability on the part of defendants. It avers ownership of the land in the plaintiff, ownership of the cattle by the defendants, the fact that they were pastured on plaintiff's land during a stated period of time, and that such pasturage was worth the amount stated in the complaint. From these facts, if proved, the law creates an implied promise and a legal liability, although the defendants' cattle were *wrongfully* on the plaintiff's land. (*Fratt* v. *Clark*, 12 Cal. 89; *Roberts* v. *Evans*, 43 Cal. 381.)

The appellants rely with great confidence on the fact that the evidence fails to show an express promise to pay, made by the defendants or either of them; but in view of the foregoing authorities, it was unnecessary for the plaintiff to prove an express promise.

The next point made in appellants' brief is, that there was no evidence as to the value of plaintiff's land for pasturage, or as to what it was reasonably worth. In looking into the transcript, however, we find that several witnesses testified on this subject, and there was sufficient evidence to justify the verdict. It is true that there was a substantial conflict, but it is in just such cases that this Court has repeatedly refused to interfere with the judgment of the Court below.

It is contended, on behalf of the defendants, that the plaintiff is concluded from recovering in this action by reason of another action commenced by him on the 5th day of July, 1877.

It appears from the record, that the plaintiff filed his complaint against the defendants in the District Court of the First Judicial District for the recovery of $10,000 damages for an alleged trespass by defendants' cattle on plaintiff's land, that a trial was duly had in said action, and a verdict was rendered therein on the 6th day of December, 1877, for the sum of $2,250 damages. It further appears, that the case in which such verdict was rendered was settled on the 10th day of November, 1878, and the action was thereupon dismissed.

But the time embraced within the complaint filed on the 5th day of July is subsequent to and does not cover any of the period mentioned in the complaint in this action. The action brought on July 5th was for trespasses committed by defendants' cattle on plaintiff's land *after* May 5th, 1877, and is for other and different acts from those set forth in the complaint in the case which we are now considering. It is clear, therefore, that the settlement of the case and the dismissal of the action of July 5th cannot affect the plaintiff's right of recovery in the present action.

The only remaining question in this case is, that the statement of H. G. Newhall (page 37 of the transcript) was incompetent and inadmissible. This may be conceded, but it did no injury to the defendants. It is clearly proved that the defendants' cattle were pastured on the plaintiff's land. On this point there is no conflict in the evidence, and whether the defendants expressly promised to pay for such pasturage or not, is, as we have already shown, immaterial. The plaintiff, in the absence of any such promise, was entitled to recover what such pasturage was reasonably worth.

Judgment and order affirmed.

McKINSTRY, J., ROSS, J., and MCKEE, J., concurred.

[No. 6,970.—Department No. 1.]

MAUD v. WEAR et al.

APPEAL—JUDGMENT BY DEFAULT—JUDGMENT ROLL—JURISDICTION.—In case of a judgment by default, the summons, with the affidavit or proof of service, and the complaint, with the memorandum of default, constitute a part of the judgment roll, and the question whether there was error in the entry of the default of the defendants before the expiration of ten days from the service of summons upon them, can be considered on an appeal from the judgment.

APPEAL from a judgment for the plaintiff, in the Sixteenth District Court, County of Kern. REED, J.

The facts are stated in the opinion.

Stetson & Houghton, for Appellants.

The default entered by the clerk was premature and unauthorized. (Code Civ. Proc. §§ 407, 585, subd. 2.) The appearance of Mr. Smith for defendants was merely equivalent to service of the summons; and, notwithstanding this appearance, defendants had the statutory time. (Code Civ. Proc. § 416; *Pearce* v. *Tally*, 8 Tex. 304.) The error can be reviewed on an appeal from the judgment. (*Ricketson* v. *Compton*, 23 Cal. 638; *Gimmy* v. *Doane*, 22 id. 635; *Burt* v. *Scranton*, 1 id. 416.)

V. E. Gregg, and *R. E. Arick*, for Respondent.

The appearance of the defendants gave the Court jurisdiction. (*Mahoney* v. *Middleton*, 41 Cal. 41; *Dyer* v. *North*, 44 id. 159.)

SHARPSTEIN, J.:

The judgment in this case must be reversed.

The summons was served on one of the defendants on the 7th, and on the other on the 8th of October, 1879, and on the 11th day of the same month their default was entered. Neither of the defendants answered, and the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendants in not answer-

ing was entered, constitute a part of the judgment roll: and the question whether there was error in the entry of the default of the defendants before the expiration of ten days after service of summons upon them, can be considered on the appeal from the judgment. The Court below seems to have laid some stress upon the fact of a notice of appearance for the defendants having been given by their attorney the day before the default was entered. The effect of that notice was not to shorten the time within which the defendants were allowed by law to answer. They were entitled to ten days after the service of the summons upon them within which to demur or answer, and it was error to enter their default before the expiration of that period of time. (*Burt* v. *Scrantom*, 1 Cal. 416; *Ricketson* v. *Compton*, 23 id. 638; *Gimmy* v. *Doane*, 22 id. 635; *Pearce* v. *Tully*, 8 Tex. 307.)

Judgment reversed, and cause remanded, with directions to the Superior Court of Kern County to allow the defendants to demur to or answer the complaint of the plaintiff, within ten days after being notified that the remittitur herein has been filed in said Superior Court.

THORNTON, J., and ROSS, J., concurred.

[No. 6,577.—Department No. 2.]

SMITH *v.* DAVIS.

STATEMENT ON MOTION FOR NEW TRIAL—ENGROSSMENT.—The statement on motion for new trial, and amendments, as allowed by the Court, must be engrossed into one, and authenticated by the signature of the Judge, in order to be regarded as the statement required by law, and to be considered on appeal. Accordingly, the Court, upon the ground that the statement was not engrossed, affirms the order of the Court below.

PLEADING—ANSWER—FRAUD.—The answer of defendant, (as set forth below) *held* to be sufficient.

APPEAL from a judgment for the defendants, and from an order denying a new trial, in the Eighteenth District Court, County of San Bernardino. MCNEALY, J.

The transcript contains the original draft of a statement pro-

posed by the plaintiff, amendments proposed by the defendants, and counter-amendments proposed by the plaintiff; and the following certificate of the Judge:

"The foregoing amendments proposed by defendant are allowed, and the further proposed amendment by plaintiff is also allowed; and said statement of plaintiff as amended is hereby settled as correct. W. T. MCNEALY, District Judge."

The action is for the recovery of personal property. The answer denies all the allegations of the complaint, except the taking, and alleges in effect that the defendant took the goods as Sheriff of San Bernardino County, by virtue of executions against the plaintiff's vendor (Gilman); and that the property was, at the time of the levy, the property of said Gilman, and that all interest of the plaintiff in the property was by virtue of a pretended sale to her by the said Gilman; and that the said sale is and was void, and fraudulently made for the purpose of hindering, delaying, and defrauding creditors of said Gilman, and without any consideration from plaintiff. The other facts are stated in the opinion.

C. W. C. Rowell, *A. B. Paris*, and *Byron Waters*, for Appellant.

Rolfe & Curtis, and *J. D. Boyer*, for Respondent:

Cited, as to the insufficiency of the statement, *Baldwin* v. *Ferre*, 23 Cal. 461; *Skillman* v. *Riley*, 10 id. 300; *Marlow* v. *Marsh*, 9 id. 259; *People* v. *Edwards*, id. 291.

By the COURT (from the Bench):

In this cause there is no statement on motion for a new trial which this Court is authorized to consider.

It appears that the proposed statement and amendments were allowed by the Judge of the Court below, but the statement and amendments were never engrossed and authenticated by the signature of the Judge.

Such documents, not engrossed into one, and attested by the signature of the Judge, have never been regarded as the statement required by law, and have never been considered by this

Court on appeal. (*Baldwin* v. *Ferre*, 23 Cal. 461.) The order denying the motion for a new trial must therefore be affirmed.

There was also an appeal from the judgment. The only point to which our attention is called in the last-mentioned appeal is the order overruling the demurrer to the amended answer of the defendant.

We have examined the answer carefully, and fail to find any errors in the ruling of the Court.

Judgment and order affirmed.

[No. 6,564.—Department No. 2.]

BUTLER *v.* BEECH.

EVIDENCE — ACCOUNT BOOKS — ALLEGATIONS — FINDINGS — CONFLICT OF EVIDENCE.—In an action for a settlement of partnership accounts, a statement of accounts between the partners, made by an expert in book-keeping, was offered in evidence by the plaintiff, and it appeared by the testimony of the witness, that the books had been altered by him by the direction of the plaintiff after the dissolution. *Held*, that if this had been the only evidence of the correctness of the statement, it would have been inadmissible in evidence; for the plaintiff had no right to alter the books, and then use them as evidence in support of his case; but *held, further*—there being sufficient evidence *aliunde* to show the correctness of the date from which the statement was made—that it was properly admitted; and *held, further*—the evidence being conflicting on the point—that the findings would not be disturbed.

FINDINGS.—The findings in the case discussed, and held not to be open to the objection that the findings of fact and conclusions of law are not separately stated.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The facts are stated in the opinion.

Thom & Ross, for Appellants. (The brief having been filed prior to the elevation of Judge Ross to the Bench.)

H. T. Hazard, for Respondent.

MORRISON, C. J.:

On the 4th day of December, 1873, written articles of copartnership were entered into between plaintiff and defendant, for the purpose of carrying on the business of "livery stable keepers, farmers, and stock-raisers," and such copartnership continued in existence until the 1st day of May, 1876, when the same was dissolved by mutual consent. Disagreements having arisen in respect to the settlement of the accounts of the firm, plaintiff filed his complaint on the 8th day of March, 1877, praying that an account be taken of the dealings and transactions of the late firm. The case was referred to George C. Gibbs, the Court Commissioner, to take testimony and report findings; and on the 5th day of December, 1877, Gibbs filed his report, from which it appears that there was due from the defendant to the plaintiff the sum of $4,510.75, and upon this report judgment was entered on the same day. Defendant made his motion for a new trial, which was denied, and the appeal is taken from the judgment as well as from the order of the Court denying the motion for a new trial.

The first point made on the appeal is, that error was committed in allowing plaintiff to introduce in evidence "Exhibit A." This exhibit purports to be a correct statement of the accounts between plaintiff and defendant, and was prepared by the witness Winslow, an expert in book-keeping. On cross-examination Winslow admitted in substance that he did not know that the books and papers from which "Exhibit A" was made up were correct, and he further stated that the books had been changed by him at the instance of the plaintiff after the dissolution of the partnership.

If this had been the only evidence to justify the admission of the exhibit, it would have been error for the Court Commissioner to have admitted the same, for it cannot be doubted that the plaintiff had no right to alter the books after the dissolution of the partnership, and then offer in evidence such altered books in support of his case. But there is other evidence establishing the correctness of the books and papers from which the statement was prepared, and this, taken in connection with the evidence of Winslow, makes the statement prepared by him competent evidence in the case.

The witness Winslow says: "I obtained these items which I have placed in the books from the notes and papers that Mr. Butler holds, and the papers, from which said additional entries are made, are here tendered in evidence"; and speaking in this connection the plaintiff says: "I think it is a correct statement of the account. It is to the best of my knowledge. It was made by Mr. Winslow and myself. We looked over the books and got up the statement the best we could. I am not an expert. I think the items stated in the account are correct." The books were then offered, so that any item which the defendant wanted to examine could be turned to. The witness Winslow then testified as follows: "My occupation is a book-keeper. This statement was obtained from Mr. Butler's books and accounts and papers, kept by him for the firm of Beach & Butler." Butler says: "All the accounts he (Winslow) has put into the books since we sold out, I have vouchers to show for them, notes and everything of the kind. I have vouchers to show for everything I have given myself credit for in that account." And further on he continues: "Perhaps both of us might have failed to keep correct accounts of the partnership, but I think I kept a correct account, or meant to. I have a record of all moneys paid to me, I think, and of all transactions, and these books contain a correct statement and are the records I have kept."

This is a portion of the evidence given on behalf of the plaintiff, and was sufficient, in our opinion, to sustain the findings of the Court Commissioner and the judgment entered thereon. It is true that there was a substantial conflict in the evidence, but the rule in such cases is that the Appellate Court will not disturb the judgment of the Court below.

In the next place, it is claimed by appellant that the Commissioner failed to settle the profit and loss account of the copartnership. In answer to this objection, it may be stated that it appears from the eighth finding that there was a full settlement and adjustment of accounts of the firm. The eighth finding is as follows: "That the amount appearing to be due the plaintiff from the defendant, of and from an adjustment of all their partnership accounts and transactions, as by the foregoing statement, is the sum of $4,510.75, in gold coin of United States."

It is also claimed on this appeal that the findings of fact and

the conclusions of law are not separately stated. The facts found are distinctly stated under several subdivisions, commencing with No. 1 and ending with No. 8, and then comes the following:

"And as a matter of law resulting from the foregoing findings of fact, I do further find that the plaintiff is entitled to have and recover of the defendant the sum of $4,510.75." In our opinion that was sufficient.

Other points made by appellant are not well taken, and no error appearing in the proceedings of the Court below, the judgment and order are affirmed.

THORNTON, J., and MYRICK, J., concurred.

[No. 6,706.—Department No. 1.]

TOMPKINS *v.* SPROUT.

PLEADING—COMPLAINT—JOINDER OF ACTIONS—DEMURRER.—*Held*, that the complaint in this case, being a combination of several independent and distinct causes of action, could not have been sustained had a demurrer been interposed.

FRAUD AS TO CREDITORS—FRAUDULENT CONVEYANCE—EQUITY—PLEADING—DEMURRER—ACTION TO QUIET TITLE—EQUITY.—In an action by a purchaser at an execution sale, to quiet title and to compel a conveyance against one who had purchased land from a fraudulent grantee of the execution debtor, by a deed made with intent to defraud creditors, the complaint alleged that the defendant claimed some estate or interest in the land adverse to the plaintiff, but that his claim was without right, and that he had no right, title, or interest therein; and the answer admitted the former and denied the latter allegation; and the Court found that the defendant had purchased *with constructive* but *without actual* notice of the fraud, and that he had paid off a mortgage on the land which was prior to the plaintiff's claim. *Held*, 1st, that the pleadings raised a material issue, and that, though the answer should have set out the nature of the defendant's claim, yet, as no demurrer or objection to the evidence was interposed, it could not be objected that the finding was not within the issue; and 2ndly, that the plaintiff was entitled to the relief prayed for, only upon the terms of paying to the defendant the amount paid by him in satisfaction of the mortgage.

ID.—ID.—ID.—In an action to set aside a deed which is only constructively fraudulent, a Court of Equity will protect the purchaser as well as the creditor, where both can be protected without injury to either.

ID.—ID.—Where the fact of fraud is established in a suit at law, the buyer loses the property; but where the proceeding is in equity, the Court will deal with the subject according to the equities of the case; the cardinal

principle, in all such cases, being that the property of the debtor shall not be diverted from the payment of his debts, to the injury of the creditor, by means of the fraud.

APPEAL from a judgment for the plaintiff, in the First District Court, County of Santa Barbara. FAWCETT, J.

The complaint contains two counts. The first count alleges that the plaintiff is seized in fee, and entitled to the possession of the land in controversy; that the defendant claims some estate or interest in said premises adverse to the plaintiff; that the claim of the defendant is without right, and that he has not any estate, right, title, or interest whatever in the said premises; and that he heretofore, on or about the 28th day of September, 1877, wrongfully entered into the possession of said premises, and ousted the plaintiff therefrom, and now wrongfully withholds the possession thereof from the plaintiff.

The second count sets up specially the facts as stated in the opinion. The other facts are stated in the opinion.

Hall & Hatch, for Appellant.

A Court of Equity, in setting aside a deed of a purchaser upon other grounds than *positive* fraud on his part, sets it aside upon terms. (*Coirou* v. *Millandou*, 19 How. 115, citing *Boyd* v. *Dunlap*, 1 Johns. Ch. 478; *Sands* v. *Codwise*, 4 Johns. 535, 598, 599.) "This constitutes the essential difference between relief in equity, and that afforded in a court of law." (Id.) The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts, to the injury of his creditors, by means of the fraud. (*Clements* v. *Moore*, 6 Wall. 312.) If the conveyance be allowed to stand for the amount of the mortgage lien, it places the plaintiff in no worse condition. "A sale of his land by the debtor, to defraud a creditor, operates as a fraud only to the extent of the interest which the creditor would have acquired by purchase, at a sale under execution, of the land fraudulently conveyed." (*Moore* v. *Besse*, 43 Cal. 511.) When a transfer is not tainted with actual fraud, but is fraudulent only by construction of law, it will be allowed to stand as security for the money advanced by the grantee. (Bump on Fraud. Con. 597 n;

Bean v. *Smith*, 2 Mason, 293.) The general denial puts in issue all the material averments of the complaint, and permits the defendant to prove any and all facts which tend to negative any of those averments. (*Elder* v. *Spinks*, 53 Cal. 293.)

Richards & Boyce, for Respondent.

The deed from Charles to Gustav Peterson was void as to plaintiff. (Civ. Code, §§ 34, 39; Bump on Fraud. Con. 19–20; *Swinford* v. *Rogers*, 23 Cal. 236; *Goodwin* v. *Hammond*, 13 id. 168; *Horn* v. *Vol. Water Co.* id. 62; Story's Eq. Jur. § 361; Will. Eq. 227; *Clements* v. *Moore*, 6 Wall. 312.)

By the execution sale and Sheriff's deed the plaintiff was invested with title. The defendant, by his purchase, did not acquire any interest therein; nor has he any claim upon the premises by reason of a mortgage lien—1st, because his answer failed to set up any equitable demand or claim for relief; and 2nd, because he did not occupy the position of a *bona fide* purchaser without notice.

Ross, J.:

The complaint in this case is a combination of several independent and distinct causes of action, and could not have been sustained had a demurrer been interposed. The main purpose of the action seems to have been to have declared null and void two certain deeds to a block of land situated in Santa Barbara; but, in addition to the averments respecting that cause of action, the complaint contains the usual allegations found in a complaint to quiet title, and also in one of ejectment. The prayer is, that the adverse claims of the defendant to the premises be determined by the Court; that it be adjudged that the defendant had no title to or interest in the block, and that he be forever debarred from asserting any claim thereto adverse to the plaintiff; that plaintiff recover possession of the premises from the defendant, and that the deeds be decreed to be null and void, and defendant be compelled to execute a conveyance of the premises to plaintiff. The complaint was not verified, and the answer was a general denial of all of the allegations of the complaint, except the allegation "that the defendant claims

some estate or interest in said premises, in the complaint named, adverse to the plaintiff."

The facts upon which the plaintiff sought to have the deeds alluded to annulled, and upon which the Court below did annul them, are substantially as follows: On the 2nd of April, 1877, one Charles Peterson was, and for some time prior thereto had been, the owner of the premises. On that day, in an action then pending in the District Court of Santa Barbara County, a decision was rendered in favor of the plaintiff, Tompkins, and against the said Charles Peterson and one Johnson, upon a money demand, upon which final judgment was entered April 7th, 1877. On the said 2nd day of April, and after the rendition of the said decision, Charles Peterson, for the purpose of defrauding the plaintiff, executed to his brother, Gustav Peterson, a deed to various pieces of property, including the block in question. Gustav received the conveyance with knowledge of the fraudulent intent of Charles, and colluded with him to defraud the plaintiff. On the 24th of April, 1879, the plaintiff caused execution to issue for the enforcement of the judgment recovered by him. The execution was duly levied by the Sheriff on all the right, title, and interest of Charles Peterson, in and to the said block, describing the same as standing on the records of the county in the name of Gustav. Under this execution the property was sold for the amount of the judgment, with interest, cost, and accruing costs, the plaintiff being the purchaser. The Sheriff thereupon issued to the plaintiff a certificate of sale in due form, the duplicate of which was duly recorded on the 31st of May, 1879. No redemption having been effected, the Sheriff, on the 21st of March following, executed to plaintiff a deed to the premises. Intermediate the delivery and recording of the certificate of sale and the execution of the Sheriff's deed—that is to say, on the 28th of September, 1879—the defendant purchased the block of land in controversy from Gustav Peterson, and received a deed therefor from him. The defendant paid full value for the land, and "did not have actual knowledge of the fact that the conveyance from Charles to Gustav was fraudulent, but did have full knowledge, both actual and constructive, that said block had been levied upon and sold as the property of Charles Peterson as aforesaid; and that plaintiff

held the Sheriff's certificate of sale therefor, and also had actual knowledge of the judgment against Charles in favor of plaintiff." Upon these facts, the Court concluded that the conveyance from Charles to Gustav Peterson was void as to the plaintiff, and that the defendant acquired no interest in the premises by his purchase from Gustav. The Court below, however, also found as a fact: "7. That, at the several dates in these findings before mentioned, down to and including September 28th, 1877, there was a valid mortgage upon and against said block 328, amounting on the last-named date to the sum of $728.55; that the defendant Sprout received his conveyance to said premises subject to said lien, and assumed the payment thereof as a part of the purchase-money, and did thereafter pay off and procure the discharge of the same; that said lien was created by Charles Peterson, by mortgage executed on the 6th day of December, 1876." And the Court also found as a conclusion of law: "6. That defendant has no claim against said premises, by reason of his payment of the mortgage lien mentioned in finding number 7," and entered judgment decreeing plaintiff to be the owner of the property; and that the defendant had no interest in or claim upon the same, and forever debarring him from asserting any interest therein adverse to the plaintiff; and further directing the execution of a deed of conveyance of the premises from defendant to plaintiff, etc.

The only point made by the defendant on this appeal is, that the Court below should have set aside the conveyance *upon terms*, to wit, upon the payment by plaintiff to the defendant of the amount paid by the latter in satisfaction of the mortgage lien.

No express mention is made, in the complaint or answer, of the lien, and it is claimed by the respondent that the seventh finding of the Court is not within the issues made by the pleadings, and cannot, therefore, be considered. The complaint, however, alleges that the defendant claims some estate or interest in the premises adverse to the plaintiff, and "that the claim of said defendant is without any right whatever, and defendant has not any estate, right, title, or interest whatever in or to said premises, or any part thereof." The answer admitted that the defendant had some claim to the property, but denied that the

claim was without right, and denied that defendant had not any estate or right therein. This, as was held in *Elder* v. *Spinks*, 53 Cal. 293, raised a material issue; and, although the pleader should undoubtedly have proceeded to set out the nature of the interest claimed by the defendant, still there was no demurrer to the answer, and it does not appear that any objection was taken to the evidence introduced under the issue as made. Under such circumstances, the objection now urged—that the finding of fact is without the issues, and cannot, therefore, be considered—cannot be sustained.

There being, at the time the plaintiff recovered his judgment against Charles Peterson, and at the time of the conveyance from Charles to Gustav Peterson, and at the time of the purchase by plaintiff under his execution sale, a valid, subsisting mortgage lien upon the property, it is obvious that the latter cannot be injured by requiring of him payment of the amount of the lien as a condition precedent to vacating the sale to the defendant. The Court below expressly found that defendant had no actual knowledge of the fact that the conveyance from Charles to Gustav Peterson was fraudulent, and that the conveyance from the latter to the defendant was constructively fraudulent only. In such case, a Court of Equity will protect the purchaser as well as the creditor, where, as here, both can be protected without injury to either.

In *Clements* v. *Moore*, 6 Wall. 312, it is said: "A sale may be void for bad faith, though the buyer pays the full value of the property bought. This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances, it visits the buyer with the same consequences which would have followed in an

action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the Court, it regards him as a trustee, and charges him accordingly. When he has honestly applied the property to the liabilities of the seller, it may hold him excused from further responsibility. *The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud.*"

In *Coiron* v. *Millandon*, 19 How. 115, the Court, by Mr. Justice Nelson, said: "A Court of Equity, in setting aside a deed of a purchaser upon grounds other than positive fraud on his part, sets it aside upon terms, and requires a return of the purchase-money, or that the conveyance stand as a security for its payment." And in *Bean* v. *Smith*, 2 Mason, 296, Judge Story said: "I agree to the doctrine laid down by Mr. Chancellor Kent, in *Boyd* v. *Dunlap*, 1 Johns. Ch. R. 478, and *Sands* v. *Codwise*, 4 Johns. R. 536, 549, that a deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; *but it is otherwise* with a deed obtained under suspicious or inequitable circumstances, or which is only *constructively fraudulent.*" Speaking of the distinction between actual and constructive fraud, he proceeds: "The former (actual fraud) makes the conveyance utterly void, as to creditors and others, whom it intends to injure, and therefore it cannot be permitted to stand as to them as a security for advances. But if no such actual fraud was originally in contemplation, the law adjudges the conveyance fraudulent on motives of public policy, as in cases of voluntary or other conveyances, which are void against creditors and purchasers; there, if any advances have been made, or any other equities arise, they may be enforced by the Court in favor of the grantee."

Applying the principles thus announced to the facts of the case under consideration, it is clear that the Court below should have imposed upon the plaintiff, as a condition to vacating the

sale to defendant, and requiring a conveyance of the property from him to the plaintiff, the payment by the latter to the defendant of the amount paid by defendant in the satisfaction and discharge of the mortgage lien existing upon the property during the time already stated. In this way, and in this way only, justice can be done between the parties.

Judgment reversed, and cause remanded to the Court below, with directions to enter judgment on the findings not inconsistent with this opinion.

McKINSTRY, J., and McKEE, J., concurred.

[No. 6,477.—Department No. 1.]

HAYNES v. WHITE ET AL.

VENDOR AND VENDEE—SALE OF LAND—FAILURE OF TITLE.—An agreement to sell land, and, upon the payment of the purchase-money, to execute a good and sufficient deed therefor, requires of the vendor to convey to the vendee the *title* to the land, and is not satisfied by the tender of a deed sufficient *in form*, when the vendor has, in fact, no title to convey.

ID.—ID.—ID.—CONTRACT—RESCISSION.—A vendee cannot maintain an action to recover his purchase-money from a vendor, who has failed to perform his contract, until he has been evicted, or has surrendered or offered to surrender the possession.

APPEAL from a judgment for the defendants, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The facts are stated in the opinion.

Barclay & Wilson, for Appellant.

A contract for the conveyance of real property is satisfied only by a valid conveyance with good title. A tender of a deed sufficient in form to transfer the title the defendants had, at the date of the contract, will not satisfy the agreement. (2 Parsons on Cont. 656; *Jackson* v. *Ligon*, 3 Leigh, 161; *Richmond* v. *Gray*, 3 Allen, 25; Civ. Code, §§ 1729, 1731.)

This is not an action to rescind a contract, and the rules governing rescission have no application. The complaint sounds

in damages only, and is based on the fact that the contract has been performed by the plaintiff under §§ 1485 and 1682 Civil Code. (Bishop on Cont. §§ 675, 672, 686, 689; *Alvarez* v. *Brannan*, 7 Cal. 510; *Jones* v. *Post*, 6 id. 102; *Powell* v. *Sammons*, 31 Ala. 552; 2 Bay, (S. C.) 91; *Van Benthuysen* v. *Crapsen*, 8 Johns. 259; 3 Call, 326; Civ. Code, § 3306.) Plaintiff cannot resist the payment of the outstanding note. Under such circumstances he cannot safely restore the property; and the vendors have no right, while holding the proceeds of the note, to demand also the possession of the property, and to leave the purchaser to pay the note. (*Fraschieris* v. *Henriques*, 36 Barb. 282.) In this case to return or offer to return the property would be an idle ceremony, which the law will not require. (Civ. Code, § 3532; *Ladd* v. *Moore*, 3 Sandf. 589; *Perley* v. *Balch*, 23 Pick. 286.) In any case, the Court has power to do complete justice, under § 3408 Civil Code, in case defendants are entitled to any return or compensation.

R. M. Widney, for Respondent.

The plaintiff has never accounted or offered to account for the rents, issues, and profits, and has never offered to restore the possession to the defendants. (*Norton* v. *Jackson*, 5 Cal. 262; *Jackson* v. *Norton*, 6 id. 187; *Reynolds* v. *Harris*, 9 id. 340; *Watts* v. *White*, 13 id. 324; *Kinney* v. *Osborne*, 14 id. 114; *Fratt* v. *Fiske*, 17 id. 380: *Morrison* v. *Lods*, 39 id. 381; Civ. Code, §§ 1689, 1691.)

Under § 1731 Civil Code, the deed is sufficient. There is nothing in the agreement binding the defendants to convey any other estate than they had when the agreement was made. The plaintiff knew what the title was.

Ross, J.:

This action, as the case is presented, cannot be maintained. The record shows that on March 1st, 1876, the defendants were in the possession of the land described in the complaint, by virtue of a contract for its purchase from one Robinson, who held the title to it. Upon the land there were then existing certain improvements, consisting of a house and an artesian well. On

the day named the defendants executed with plaintiff the contract in writing set out in the complaint, by which the defendants agreed to sell to the plaintiff, and the plaintiff to buy of the defendants, the land in question for the sum of thirty-six hundred dollars, to be paid as follows: One hundred dollars cash; nine hundred dollars on or before two months from the date of the contract; thirteen hundred dollars on or before one year from its date, and the remaining thirteen hundred dollars on or before two years from date. The defendants further agreed, that on receiving the payments at the time and in the manner stated—time being by the contract declared to be of its essence—they would execute to the plaintiff, or his assigns, a good and sufficient deed of the premises. There were, also, other covenants on the part of the plaintiff, not, however, material to be mentioned. At the time of the contract the plaintiff executed his promissory notes for the deferred payments, the last one of which, for some cause not explained, was made payable to the defendant White, or order. Upon the making of the agreement, the defendants placed the plaintiff in possession of the land, including the improvements, and he has ever since remained in possession, and has received the rents, issues, and profits of the premises to a large amount. He paid to the defendants all of the installments of the purchase-money except the last, namely, the $1,300, evidenced by the note made payable to White or order. This note White transferred before maturity to the defendant Thomas, and Thomas transferred it, also before maturity, to one Steele, who held it when it became due. Plaintiff knew that Steele held the note, and while it was in his possession paid him interest thereon. When the last payment became due the plaintiff told the defendants that he was prepared to make it, and offered to them the money upon the condition that they convey to him the title to the property.

In view of the facts appearing in the record, we attach no importance to the finding that the plaintiff never offered to pay the note to *Steele*, nor to the findings in regard to the signing by the defendants of a deed "sufficient *in form*" to convey the title. The manifest effect of the contract, and the manifest intent of all the parties to it, was that in consideration of the plaintiff's money the defendants were to convey to him the title to

the land—not that they should go through the idle ceremony of executing a deed "sufficient *in form*" for that purpose, when they had, in fact, no title to convey.

The defendants failed to comply with the contract with Robinson, and the latter, prior to the commencement of the present action, commenced suit in the Nineteenth District Court against the present plaintiff and defendants, among others, for the purpose of annulling the contract held by defendants at the time of the making of the contract mentioned in the complaint, and for the purpose of recovering possession of the property. In the action thus commenced by Robinson, these defendants filed a disclaimer of any interest or estate in the premises. They failed to comply with their part of the contract here in question, for they did not and could not convey to the plaintiff the title to the property; and the plaintiff having complied in part, and offered to complete the performance of the contract on his part, it is clear, that had he surrendered or offered to surrender to defendants the possession of the property, he could have maintained an action against them. Instead of doing this, he retained the possession of all the property, and commenced this action to recover of the defendants "the sum of $26,012, the amount already paid by plaintiff on the purchase-money for said lands, and for the sum of $1,000 damages suffered by plaintiff, and for the further sum of $2,500 damages to cover loss of improvements and the promissory note made payable to White."

It would be clearly wrong to permit the plaintiff to hold the possession of the property which he received from the defendants, and which may ripen into a perfect title, and at the same time to recover back from the latter the purchase price; and it is well settled that it cannot be done. (*Morrison* v. *Lods*, 39 Cal. 381; *Jackson* v. *Norton*, 6 id. 187; *Purdy* v. *Bullard*, 41 id. 444; *Truebody* v. *Jacobson*, 2 id. 287; *Fletcher* v. *Mower*, No. 6,258, not reported.)

Section 3306 of the Civil Code, relied on by counsel for the appellant, only declares the *measure of damages* caused by the breach of an agreement to convey an interest in real property. "The detriment," says the statute, "is deemed to be the price paid, the expenses properly incurred in examining the title and

preparing the necessary papers, with interest thereon; but, adding thereto, in case of bad faith, the difference between the price to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

But, before an action can be maintained to recover this detriment, the plaintiff must have been evicted, or have voluntarily surrendered, or offered to surrender possession. He cannot, as already observed, hold on to the property, and at the same time recover back what he paid.

The judgment and order are affirmed.

MORRISON, C. J., and MCKINSTRY, J., concurred.

[No. 7,128.—Department No. 1.]

DANIELWITZ *v.* TEMPLE ET AL.

STATE LANDS—CONTEST—JURISDICTION.—The judicial department of the State has no jurisdiction of a contest between opposing applicants for the purchase of State lands, unless it has been specially referred to a Court by the Surveyor-General, or Register of the State Land Office, under § 3415 of the Political Code; and, as a jurisdictional fact, the order must be proffered or averred in the complaint, and proved.

APPEAL from a judgment for defendant, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The facts are stated in the opinion.

Henry T. Hazard, for Appellant.

A. W. Hutton, for Respondent.

By the COURT (from the Bench):

The action was dismissed by the Court below, upon the ground that the complaint did not show, by proper averments, that the alleged contest between the parties had been, by order of the Surveyor-General, referred to the Court for trial. The judicial department of the State has no jurisdiction of a contest between

opposing applicants for the purchase of lands belonging to the State, unless it has been specially referred to a Court by the Surveyor-General or Register of the State Land Office, according to the provisions of the act for regulating the sale of such lands. It is by virtue of the order of reference that a Court acquires jurisdiction to hear and determine the contest, and as a jurisdictional fact, the order must be proffered or averred in the complaint, and proved. In *Berry* v. *Cammet*, 44 Cal. 347, the Court says: "In order to give a Court jurisdiction of a controversy arising between applicants for the purchase of lands of the State, the facts conferring jurisdiction must be stated in the complaint."

There is no error in the record.

Judgment affirmed.

[MORRISON, C. J., sat in the foregoing case in the place of ROSS, J., the latter being disqualified and taking no part in the decision.]

[No. 7,022.—Department No. 1.]

THOMAS *v.* ANDERSON ET AL.

APPEAL—ENTRY OF JUDGMENT.—The appeal in this case dismissed, because taken before the entry of judgment.

APPEAL from a judgment, and from an order denying a new trial, in the Eighteenth District Court, County of San Bernardino. MCNEALY, J.

After the oral argument, and before the decision, a copy of the judgment as entered (subsequently to the appeal) was filed in the case.

The other facts are stated in the opinion.

Satterwhite, Waters & Talbot, for Respondents.

J. D. Boyer, for Appellant.

MORRISON, C. J.:

Respondents move the Court to dismiss the appeal in this case, on the ground that no judgment has been *entered* in the Court below. It appears from the transcript that the case was tried before the Court, and when the Judge filed his findings of fact, the following entry was made by the Clerk in Minute Book F, page 103: "In this case, heretofore tried and submitted, the Court gives judgment for defendants, October 13th, 1879."

On the 16th day of December, 1879, plaintiff gave notice of his motion to move for a new trial, and on the 2nd day of February, 1880, the following entry was made in the case:

"Title of Court and Cause. The plaintiff moves the Court for a new trial on the ground specified in his notice of motion on file. The motion is submitted, and is denied. Plaintiff excepts." (Minutes of Court, February 2nd, 1880, Book I, p. 22.)

Thereupon plaintiff filed his notice of appeal from the so-called judgment and the order denying his motion for a new trial. It is claimed, on behalf of the respondents, that no judgment has been *entered* in the case; that the appeal has been prematurely taken, and should, therefore, be dismissed.

Section 670 of the Code of Civil Procedure provides, that immediately after entering judgment, the Clerk must attach together and file the following papers, which constitute the judgment roll:

"1. In case the complaint be not answered by any defendant, the summons with the affidavit or proof of service, and the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a *copy of the judgment.*

"2. In all other cases, the pleadings, a copy of the verdict of the jury or finding of the court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer, or relating to a change of parties, and a *copy of the judgment.*"

It will be observed that whether judgment is entered by default, or after trial, a copy of the judgment is a part of the judgment roll.

By § 661 of the same Code, it is provided that "the judgment roll and the affidavits or bills of exceptions, or statement, as the case may be, used on the hearing, with a copy of the order

made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the Court, and in that case the judgment roll, and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal." In all cases on appeal, the judgment roll shall appear in, and constitute a part of the record.

Section 939 of the Code of Civil Procedure provides that an appeal may be taken from a final judgment in an action or special proceeding, commenced in the court in which the same is rendered, within one year after the *entry* of judgment.

The question here presented is: Has any judgment been entered in the case? Was the entry in the minute-book of the Clerk simply an order for a judgment thereafter to be entered, or was it an entry of the judgment itself? Section 336 of the Practice Act authorized an appeal to be taken from a final judgment, within one year "after the rendition of the judgment," and in the case of *Gray* v. *Palmer*, 28 Cal. 416, Justice Sawyer says: "The words 'rendered' and 'rendition' and the word 'entered' are frequently used in the Practice Act, and in no instance does the latter word appear to us to be used in the same sense as either of the former."

It has been held in a number of cases, that the year within which an appeal must have been taken under § 336 of the Practice Act began to run from the time when the judgment was announced by the Court, and entered upon the minutes by the clerk, and not from the time it was *entered* in the judgment book. (*Gray* v. *Palmer*, 28 Cal. 416; *Peck* v. *Courtis*, 31 Cal. 208; *McCourtney* v. *Fortune*, 42 Cal. 387.) But the provision of the Practice Act on this subject has been changed by the Code of Civil Procedure, and the year within which the appeal must be taken now commences running from the date of the *entry* of the judgment, and before such entry no appeal can be taken. The precise question has been before Department No. 2 of this Court, and was there passed upon. Referring to the change in the statute, by the substitution of the word "entry" in the place of the word "rendered," or "rendition," SHARPSTEIN, Justice, says: "The Legislature must be presumed to have been familiar with the decisions, and to have had them in

view when it changed the clause as above stated. It adopted the definitions which the Court had given to the two words, by substituting one for the other. It, in effect, enacted that thereafter an appeal must be taken within one year after the *entry* of the judgment, instead of within one year after the *rendition* of a judgment." (*McLaughlin* v. *Doherty*, 54 Cal. 519.) It was there held that a judgment is "rendered" when an order for a judgment is made by the Court, but is not "entered" until it is entered in the judgment book.

In this case, no judgment has been entered in the judgment book, and the appeal was, therefore, prematurely taken.

Appeal dismissed.

ROSS, J., and MCKINSTRY, J., concurred.

[No. 6,518.—Department No. 2.]

CHESTER *v.* BOWER.

EVIDENCE—PARTY IN INTEREST—PROOF OF RECORD—EXCLUSION OF WITNESSES.—A party in interest, though not a party of record, should be allowed to be present at the trial, and should therefore be excepted from an order excluding witnesses from the court-room during the trial.

ID.—DECLARATIONS—OBJECTIONS TO EVIDENCE.—It is not error for the Court to refuse to strike out evidence, some of which is admissible. The motion should be directed exclusively to the objectionable testimony.

ID.—MATERIALITY OF EVIDENCE.—Certain evidence, stated in the opinion, held to have been rightly excluded, as immaterial.

INSTRUCTIONS—EXCEPTION—SALE—CHANGE OF POSSESSION—FRAUD AS TO CREDITORS.—The instruction, appearing in the statement, was given by the Court. *Held*, that—in the absence of an exception—the instruction could not be reviewed: and *held further*, that the instruction did not appear to be erroneous or calculated to mislead the jury.

APPEAL from a judgment for the defendant, in the Sixteenth District Court, County of Kern. REED, J.

The judgment in the case of *L. Hirshfeld & Co.* v. *Wm. Glendenning*, (referred to in the opinion) was entered (as alleged in the answer) on May 21st, 1878, for the sum of $854.65, and costs amounting to $117.70. The property is described in the complaint as follows: "2,638 sheep with an ear mark, a hole in each ear," and was delivered to the plaintiff under a writ of re-

plevin. The verdict was that, "the defendant is entitled to the return of the property described in the complaint, and that said property is of the value of $2,295;" and the judgment was that defendant recover "2,698 sheep, marked with an ear mark in each ear, and in case the return thereof be not made," then the value as found by the jury.

The instruction referred to in the opinion is as follows: "If the jury believe from the evidence that Glendenning sold the sheep in controversy on the 1st day of May, 1878, and that thereafter the same herders previously employed by Glendenning continued in the possession and charge of said sheep, and still remained in the possession and charge of the sheep at the time of the levy of the attachment, and that there had been no actual, absolute, and continued change of possession in regard to said sheep, you will find for the defendant."

The other facts are stated in the opinion.

Geo. E. Otis, and *Stetson & Houghton*, for Appellant.

The declarations of a vendor of personal property, made after the sale, are not admissible in evidence for the purpose of showing a fraudulent intent on his part, in making the sale. (*Hutchings* v. *Castle*, 48 Cal. 153; *Visher* v. *Webster*, 13 id. 58; *Cohn* v. *Mulford*, 15 id. 50; *Jones* v. *Morse*, 36 id. 205.)

The Court erred in not permitting us to show that the deed from the plaintiff was intended as a mortgage. The plaintiff having sworn that the land was his, and the deed having been admitted—over the objection of plaintiff—for the express purpose of discrediting the plaintiff, it was material in rebuttal to show that the plaintiff did not commit perjury in the case.

The eighth instruction asked for by defendant was calculated to mislead the jury. The judgment is for sixty sheep more than was claimed, or than was awarded by the jury. This was a clerical error, but we were entitled to have it corrected.

B. Brundage, and *R. E. Arick*, for Respondent.

MYRICK, J.:

This is an action to recover possession of 2,638 sheep and $500

damages. Defendant, Sheriff, justified under a writ of attachment issued in the case of *L. Hirshfeld & Co.* v. *Wm. Glendenning*. Glendenning had been the owner of the sheep, and the question in controversy was whether the sale of them by him to Chester had been, prior to the seizure under the attachment, accompanied with an actual and continued change of possession, and whether the sale was a *bona fide* transaction, or for the purpose of hindering, delaying, and defrauding creditors, and particularly Hirshfeld & Co. The jury rendered a verdict for defendant, and plaintiff appealed from the judgment rendered thereon.

After the jury had been impanneled, on plaintiff's motion, the Court made an order by which witnesses were excluded from the court-room; but H. Hirshfeld was excepted from the ruling by the Court, on the ground that he was a party in interest, though not a party of record. We see no error in permitting H. Hirshfeld to be present. Being a party in interest, he should have been allowed to be present and aid in or observe the progress of the trial.

H. Hirshfeld, examined as a witness for defendant, testified to conversations had by him with Glendenning, out of the hearing of plaintiff. It appears that these conversations were parts of talks that the witness had with the parties separately, he reporting to each what the other had said, except the last remark of Glendenning. Plaintiff moved to strike out these conversations with Glendenning, which was refused. We see no error in the ruling. The motion did not separately point to the last remark above referred to.

As a circumstance to show change of possession, plaintiff testified that the sheep were driven upon land owned by him. To rebut that evidence, defendant put in evidence a deed of the land from plaintiff to another. Plaintiff offered to prove by parole that the deed was in fact a mortgage. This evidence was ruled out. It was not material to the issue in this case whether the paper was a deed or a mortgage; the material question was, who was in the occupancy of the land?

For the purpose of impeaching the witness Glendenning, and as evidence in rebuttal, plaintiff offered to prove by one Jewett that Glendenning had said, in October, 1877, that he had sold a one-half interest in the sheep to plaintiff. It was an immate-

rial fact whether he said that or not, as plaintiff does not claim that he purchased from Glendenning in October; nor does he claim a delivery of possession before the first of May, 1878.

Appellant, in his points on file, alleges as error the giving of the eighth instruction asked for by defendant. No exception to the giving of the instruction appears in the transcript. Even if there had been an exception, it does not appear to us to be an erroneous instruction, or one calculated to mislead the jury.

Judgment affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 6,956.—Department No. 2.]

KERN VALLEY BANK *v.* CHESTER.

CONTINUANCE.—The affidavit, upon a motion for a continuance on the ground of the absence of a witness, must show the materiality of the evidence, and that due diligence has been used to obtain it.

ATTORNEY'S FEE—PLEADING—EXHIBIT.—In an action for the foreclosure of a mortgage, the complaint contained no allegation as to attorney's fee, further than the allegation of the execution of the mortgage; but a copy of the mortgage, which contained a stipulation for an attorney's fee, was attached to the complaint. *Held*, there was no error in allowing an attorney's fee.

ID.—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.—The facts stated in an affidavit of newly-discovered evidence, on motion for a new trial, *held* not to disclose sufficient grounds for granting the motion.

APPEAL—JUDGMENT ON APPEAL—MODIFICATION OF JUDGMENT.—Cause remanded, with directions to modify the judgment by deducting an amount improperly found by the Court to be due to the plaintiff for taxes, and included in the judgment.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Sixteenth District Court, County of Kern. REED, J.

The complaint alleges the execution of the mortgage, and a copy is attached and made part of the complaint. It also prays for $800 as attorney's fee: otherwise there is no allusion to the subject. The affidavit for new trial states in effect that, since the trial of the case, defendant had learned that the plaintiff, before the commencement of the suit, agreed with his at-

torney that the fee should be $50, and that this was the whole amount paid or agreed to be paid by the plaintiff; that the defendant obtained this information from a party who had it from the president of the plaintiff; and that if a new trial should be granted, she could prove the fact by the said president.

Stetson & Houghton, for Appellant.

The Court erred in allowing an attorney's fee. There was no allegation in the complaint as to such fee. The finding of the Court upon this point was outside of the issues. (*Tibbett* v. *Cross*, Oct. Term, 1876; Stat. 1873–4, p. 707; Code Civ. Proc. § 426; *Jerome* v. *Stebbins*, 14 Cal. 457.) No evidence was offered to show that such fee had been paid, or a liability incurred therefor. (*Patterson* v. *Donner*, 48 Cal. 369.) Making the mortgage a part of the complaint, by annexing it as an exhibit, was not sufficient. (*Denver* v. *Burton*, 28 Cal. 549.) The affidavit of newly-discovered evidence shows that the fee agreed upon by the plaintiff was only $50. It does not appear that plaintiff has ever paid any amount for taxes levied on the mortgaged premises.

V. A. Gregg, for Respondent.

The affidavit of newly-discovered evidence does not state why the affidavit of the party, who is to give the evidence, was not procured. (*Arnold* v. *Skaggs*, 35 Cal. 684; 6 id. 228.)

SHARPSTEIN, J.:

This is an appeal from a judgment of foreclosure, and from an order denying defendants' motion for a new trial.

The defendants are husband and wife, and filed separate answers to the complaint. The former, in his answer, denies the allegation of the complaint that the plaintiff had paid State and county taxes to the amount of $603, or in any amount. He further denied the allegation that no part of the interest on the principal sum claimed to be due on the note had been paid. The answer of the other defendant contains the same denials. When the case was reached and called for trial, Mrs. Chester, one of the defendants, moved for a continuance upon her own

affidavit, which stated in substance that her attorney was necessarily absent, being engaged in a distant county in the actual trial of a cause, and that her husband and codefendant, and one Force, were both necessary and material witnesses in her behalf, and were necessarily absent, being at San Francisco, the former attending a trial of a case in which he was a party and material and necessary witness. She did not state what she expected to prove by said witnesses, or either of them. It is sufficient to say of this affidavit that it does not show the materiality of the evidence which the defendant expected to obtain, or that due diligence had been used to procure it. (Code Civ. Proc. 595.) Granting or refusing a continuance on account of the absence of counsel is a matter which rests largely, if not wholly, in the discretion of the Court, and we cannot see that there was any abuse of discretion in this case. The defendant was represented by counsel, and the defense set up in her answer was not of a character to require any preparation in order to present it fairly.

There was no error in allowing an attorney fee. (Stat. 1873–4, p. 707.)

As before stated, there was an allegation in the complaint, and denial in the answer, that plaintiff had paid taxes upon the mortgaged premises. To prove that issue, only one witness was introduced on behalf of the plaintiff, who testified that he paid the taxes on the land described in the mortgage for the year 1877–8, amounting to $671.20, to the Tax Collector of Kern County, by buying the land in at tax sale; and that he, for the Bank, (plaintiff) received a certificate of such sale and purchase. On being asked by defendant's counsel how he knew it was the same land, witness answered, "By that certificate." The plaintiff then offered the certificate in evidence, and defendant's counsel objected to the introduction, "on the ground that it did not appear that the land described in the certificate, or any part of it, was described in the complaint or mortgage sought to be foreclosed, and that it was irrelevant and immaterial." The objection was overruled, defendants excepted, and the certificate was admitted in evidence. The certificate does not embrace the mortgaged premises, and as it was the only evidence introduced to prove the payment of the taxes for the

year 1877–8, there is no proof that the taxes for that year were paid. The Court, however, found that they were paid, and that the plaintiff paid them, and rendered a decree accordingly.

The amount of said taxes, with interest, as found by the Court and inserted in the decree, is $716.51. To that extent the judgment is erroneous, and must be modified.

The affidavit in support of the motion for a new trial, on the ground of newly-discovered evidence, does not disclose sufficient grounds for granting the motion.

Cause remanded, with directions to the Superior Court of Kern County to modify the judgment heretofore entered in the above entitled action, by deducting therefrom the sum of $716.51, as of the date of the entry of said judgment; and as thus modified, said judgment and order denying a new trial are affirmed.

THORNTON, J., and ROSS, J., concurred.

[No. 7,024.—Department No. 2.]

LEONIS v. LAZZAROVICH.

MARRIED WOMAN—MISTAKE—REFORMATION OF DEED.—A Court of Equity cannot reform the deed of a married woman.

ID.—CONVEYANCE—ACKNOWLEDGMENT.—A married woman can only be divested of her real estate in the mode prescribed by statute; and the certificate of acknowledgment, (required by §§ 1186 and 1191 Civil Code) are as much an essential part of the execution of the deed as her signature.

MISTAKE—FINDINGS—CONFLICT OF EVIDENCE.—To reform a deed on the ground of mistake, the evidence must be clear and convincing, making out the case to the entire satisfaction of the Court, and not loose, equivocal or contradictory, leaving the mistake open to doubt. *Held*, accordingly, that it might be seriously doubted, in view of the substantial conflict in the testimony, whether a finding of mistake was justified, but the decision placed upon another ground.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The facts are stated in the decision.

Glassell, Smith & Smith, and *Bicknell & White*, for Appellants.

A married woman's title to her separate property can neither be conveyed nor affected in any other way than that prescribed by the laws of the State. To allow in evidence her parole declarations as to her intentions, would be practically to abrogate the provisions of the Civil Code as to conveyances by married women. (*Maclay* v. *Love*, 25 Cal. 367; *Morrison* v. *Wilson*, 13 id. 494.)

Howard, Brousseau & Howard, for Respondent.

The answer does not allege the fact that appellant is a married woman; nor does the complaint. The most that can be claimed by appellant is, that there is a recital in the complaint to that effect. Such recital or reference raises no issue. (*Stringer* v. *Davis*, 30 Cal. 318; *Shafer* v. *Bear River & A. M. Co.* 4 id. 294; 1 Chitty's Pol. Code, 231.) When through a mutual mistake of the parties a written instrument does not express the intention of the parties, it may be revised, on application of a party aggrieved, so as to express that intention. (Civ. Code, §§ 3399, 3401.)

MORRISON, C. J.:

This action is brought to correct an alleged mistake in a deed executed by appellant and her husband, to certain lands situate in the County of Los Angeles. The foundation of the complaint is, that other lands, in addition to those described in the deed, were meant and intended to be included therein, but were, by mutual mistake, omitted. It is in the exception clause in the deed that the mistake is said to have occurred. The language of the deed is: "Excepting from the operation of this conveyance, all those lots of land contained in blocks X and Y of the Mount Pleasant Tract, a description of which tract is contained in a map made by Moore & Kelleher, of said tract, and recorded in the County Recorder's office."

This is claimed to be a mistake, and instead thereof the exception should have been as follows: "Excepting from the

operation of this conveyance, all those lots of land contained in block X and block Y of the Mount Pleasant Tract, which had been already sold and conveyed by the parties of the first part hereto, before the execution by them of a certain mortgage of said lots to the party of the second part hereto, dated June 19th, 1876, and recorded in the Los Angeles County Records, Book 19 of Mortgages, page 389, a description of which tract is contained in a map made by Moore & Kelleher, of said Mount Pleasant Tract, and recorded in the Los Angeles County Recorder's office, in the miscellaneous records."

On the trial in the Court below, several witnesses were examined on behalf of the plaintiff, for the purpose of proving the mistake in the deed, and about an equal number testified on behalf of the defendant, to the effect that there was no such mistake. The defendant, by her counsel, objected to the introduction of any evidence in the case tending to prove that there was a mistake in the deed, and reserved her exception to the ruling of the Court, admitting such evidence. The Court entered a decree reforming the deed in accordance with the prayer of the complaint.

In view of the substantial conflict in the evidence, it may be seriously doubted whether such a case was made as would justify the Court below in finding that the alleged mistake really existed; for the rule in cases of this character is, that "the evidence must be clear and convincing, making out the mistake to the entire satisfaction of the Court, and not loose, equivocal, or *contradictory*, leaving the mistake open to doubt." (*Lestrade* v. *Barth*, 19 Cal. 660; Story's Eq. Jur. § 152.)

We say it may well be doubted whether the evidence in the case was sufficiently clear, convincing, and free from doubt, as to justify a Court of Equity in decreeing a reformation of the instrument; for we have the admission of plaintiff's counsel, made during the progress of the trial, *that plaintiff did not claim anything in block Y;* and also the evidence of Judge King, the notary who took the acknowledgment, that defendant, after the deed had been read to her in English and Spanish, positively refused to sign it until the exception clause was incorporated in it.

But we do not deem it necessary to rest this opinion on the

ground that the decision of the Court below was not sustained by the evidence. There is another question in the case which, in our opinion, is conclusive of the rights of the parties to this suit.

The defendant is a married woman, and it is a conveyance made by a *femme covert* which is sought to be reformed. It is claimed by the respondent that it does not affirmatively appear that the defendant is a married woman, but that fact is sufficiently apparent, not only in the pleadings, but in the evidence. The deed executed by the defendant is attached to the complaint, and made a part thereof, and the defendant is therein stated to be a married woman. The certificate of acknowledgment described her as a married woman, and in the evidence she is spoken of as the wife of John Lazzarovich. The question here arises, can a Court of Equity reform the deed of a married woman? Was it within the equitable powers and jurisdiction of the Court below to decree, as it did, that the defendant should, within a certain time fixed by the decree, execute to the plaintiff her deed conveying lands not described *in any deed or other written instrument*, and in case she made default, that such deed should be executed by the Clerk of the Court? This is what the Court did by its decree, and it is the correctness of such proceeding that we are now called upon to review.

Whatever rights and powers a married woman has, or can legally exercise, in the disposition of her property, are matters of statutory regulation. At common law she possessed no power to convey her lands, except by fine and recovery, and that law constitutes the basis of our jurisprudence; and rights and liabilities must be determined in accordance with its principles, except so far as they are modified by statutes. (*Van Maren* v. *Johnson*, 15 Cal. 308; *Dow* v. *Gould & Curry Silver Mining Co.* 31 id. 640.)

"The conveyance of a *femme covert*, except by some matter of record, was absolutely void at law; and in England the wife used to pass her freehold estate by a fine; and this, and a common-law recovery, were the only ways in which she could, at common law, convey her real estate." (2 Kent's Commentaries, 151.) And, although she is now permitted by statute to

convey by deed, her agreement, with the consent of her husband, for a sale of her real estate, is absolutely void at law, and Courts of Equity never enforce such a contract against her. (2 Kent's Commentaries, 169; *Wooden et al.* v. *Norris and wife*, 2 Green Ch. 65; *Watrous* v. *Chalker*, 7 Conn. 224; *Butler et al.* v. *Buckingham*, 5 Day, 492.) In the case last referred to, a *femme covert*, with the consent and approbation of her husband, agreed to sell a lot of land for a valuable consideration; and the consideration paid was appropriated to her separate use. The intended purchasers entered on the land, erected a house and store thereon, and were in the possession for twenty years; and under all these circumstances the Court held the agreement of the *femme covert* void, and that chancery could give no relief. This case was cited by the Court, with approbation, in the more recent case of *Watrous* v. *Chalker*, 7 Conn. 227.

Let us, then, inquire how far the rights and powers of married women, in this respect, have been modified by statute. Section 162 of the Civil Code declares that "all property of the wife owned by her before marriage, and that acquired afterward by gift, bequest, devise, or descent, is her separate property, which she may convey without the consent of her husband." By chapter two of the same Code the transfer of real property by the wife is regulated. Section 1093 provides that "no estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged in the manner prescribed by §§ 1186 and 1191."

Section 1186.—"The acknowledgment of a married woman to an instrument purporting to be executed by her must not be taken unless she is made acquainted, by the officer, with the contents of the instrument on an examination without the hearing of her husband; nor certified unless she thereupon acknowledge to the officer that she executed the instrument, and that she does not wish to retract such execution"; and § 1191 prescribes the form of the certificate of acknowledgment in such cases.

The certificate is absolutely essential to the deed, and is a material part thereof. The case of *Mariner* v. *Saunders*, 5 Gilman, 125, is an instructive one on this subject. The Court

there says: "By the eleventh section of an Act of the Territorial Legislature, passed September 17th, 1807, and by an amendment thereto, passed in 1813, the manner, and before whom a deed purporting to convey the estate of the wife shall be acknowledged by her, is prescribed, and deeds thus acknowledged and certified are declared to be good and effectual as if the wife were *sole*. These statutes were in force at the time this deed purports to have been executed, and there is no pretense that there was any such certificate of acknowledgment as the law required. Without such acknowledgment the deed was *absolutely void, and had no more vitality than a piece of blank paper*. Only by virtue of such acknowledgment certificate could the deed become operative. Its execution could be proved in no other possible way, and in no other way could she convey. The certificate of acknowledgment of a deed from a *femme covert*, to convey her own lands, is as much an essential part of the execution of the deed as her seal or signature, and without it the law presumes that it was obtained by fraud or coercion. This deed, then, was void as to the wife." And in the case of *Mason* v. *Brock*, 12 Ill. 276, the same Court says, "A married woman can only be divested of her real estate in the mode prescribed by statute." This brings us to the decisions of our own State, where we find the same doctrine enunciated.

In *Morrison* v. *Wilson*, 13 Cal. 498, the Court says: "The general rule is, that if the conveyance of a *femme covert* be not executed according to the forms prescribed by the statute, it is not valid, and accordingly it has often been held that when the certificate of acknowledgment was defective in any substantial particular, the *femme's* title did not pass. It would be strange if a mere defect of this kind avoided the deed, though regularly signed, and proven to have been fairly and voluntarily made, and yet a loose declaration of the *femme* in the presence of her husband, and possibly made by his connivance or constraint, and in total ignorance by the wife of its legal effect, or even of the real facts of the transaction, could pass her estate. * * * It is true that it is said by some writers that fraud vitiates all contracts, even those made by infants or *femmes;* but we apprehend that in cases of married women, under statutes like ours, this doctrine is limited to this, that a contract so infected can-

not be enforced; but not that a fraudulent representation will divest a *femme's* title in the face of a statute declaring a *different and exclusive mode of divestiture.* * * * But if we hold that a *femme covert* cannot be divested of a title by *parole or an estoppel in pais*, directly operating upon the title, it would be illogical to hold that such divestiture could be effected by an estoppel created by taking possession under a bad title." In *Maclay* v. *Love et al.*, 25 Cal. 374, the Court says, "that the wife has the power to create a charge upon her property, but she has no power to create it in any other mode than the one prescribed by the express provisions of the statute." To the same effect are the cases of *Ewald* v. *Corbett*, 32 Cal. 493; *McLeran* v. *Benton*, 43 id. 467, and *Terry* v. *Hammond*, 47 id. 32.

The case of *Barrett* v. *Tewksbury et al.* (9 Cal. 13) was a suit in equity to correct an insufficient acknowledgment to a deed of a married woman, and it is there said: "The deed not being properly acknowledged is insufficient. It is not in the power of a Court of Equity to compel a married woman to correct an insufficient acknowledgment. Her consent must be perfectly free. She can make no contract to bind her, except in the manner prescribed by the law. The provisions of the statute must be strictly pursued. She must be examined separate and apart from her husband."

The case of *Mariner* v. *Saunders*, (5 Gilman, 125) holds that the certificate of acknowledgment of a married woman is an essential part of the execution of the deed, just as much so as the signature or seal, and if it cannot be reformed, what other essential part of the deed can be reformed?

We are aware that some changes have been made in the Code since the foregoing California cases were decided, but these do not affect the question now under consideration. It is true that the wife can now, under § 162 of the Civil Code, convey her separate property without the consent of her husband, and that either husband or wife may, under § 158 of the same Code, enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried. Yet, when it comes to the disposition or conveyance of the real property of the wife, the mode is prescribed by the statute, and that mode must be pursued.

In addition to other sections of the Code referred to above, which apply to and regulate conveyances by married women, there is § 1187 of the Civil Code, which contains the following provision: "A conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner, except as mentioned in the last section; but such conveyance has no validity until so acknowledged."

We have thus seen that there is but one mode by which a married woman can convey her separate estate, and that is prescribed by statute. All the cases hold that the provisions of the statute must be substantially complied with; and if the certificate of acknowledgment is insufficient, the conveyance is absolutely void.

But in the case now in hand there was no conveyance whatever of the land in controversy. The description in the deed does not embrace it, and it is sought to prove a parol agreement on the part of the wife to convey this particular tract of land. A *femme covert* can only be bound by a written instrument, executed and acknowledged by her in the manner prescribed by law, and it is not competent for a Court of Equity to supply defects in description any more than it can reform a certificate of acknowledgment. That the latter cannot be done has been expressly decided in the case of *Barrett* v. *Tewksbury*, 9 Cal. 13; and that the former cannot be done is equally clear upon principle and authority.

Judgment reversed and cause remanded, with instructions to render judgment for defendant, the appellant.

MYRICK, J., concurred.

THORNTON, J., concurred in the judgment.

[No. 6,420.—Department No. 1.]

LANTERMAN *v.* WILLIAMS.

PAROLE PARTITION OF LAND.—It is essential to the validity of a parole partition of land that it shall be fully executed and followed up by a several possession by the parties, or their grantees. Accordingly, a parole agreement for partition held to be void, because of such a character that it could not have been followed by such a possession as the law makes essential to its validity.

APPEAL from a judgment for the defendant, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The facts are stated in the opinion.

Barclay & Wilson, for Appellant.

To uphold a parole partition, it must satisfactorily appear, not only that there has been an agreement to make the partition, but that the same has been fully executed and followed by a several possession by the parties or their grantees. (*Long* v. *Dollarhide*, 24 Cal. 218; *Porter* v. *Hill*, 9 Mass. 34; *Perkins* v. *Pitt*, 11 id. 125; *Gratz* v. *Gratz*, 4 Rawle, 412; Freeman on Cotenancy, etc., §§ 398, 400; 1 Wash. R. P. 685; *Gallreath* v. *Gallreath*, 5 Watts, 146; 3 Parsons on Cont. 393.)

Will. D. Gould, *James H. Blanchard*, and *J. W. Stump*, for Respondents.

The partition was valid. (*Elias* v. *Verdugo*, 27 Cal. 418; *Long* v. *Dollarhide*, 24 id. 218; *Gates* v. *Salmon*, 46 id. 361; *Wade* v. *Deray*, 50 id. 379; Civ. Code, § 1742; Code Civ. Proc. § 1971.)

Ross, J.:

This action was brought to obtain partition of the rancho "La Cañada," situated in Los Angeles County. The plaintiff, in his complaint, after alleging that he and the defendant, A. W. Williams, are each the owner of an undivided one-half of the rancho, by virtue of a conveyance made to them by A. Glassell and A. B. Chapman, in December, 1877, proceeds, and alleges that on the 16th of December, 1875, plaintiff and Will-

iams entered into the possession of the property under a contract previously made by them with Glassell and Chapman for its purchase, and that shortly after their entry thereon they "agreed upon a partition thereof in manner following, to wit: That a line, or avenue, should be run as nearly as might be through the center of said rancho, from the easterly to the westerly ends thereof, and other lines were to run from the northerly to the southerly boundaries of said rancho, as nearly as might be, parallel with the east and west section lines of the United States surveys, extending over, or produced so as to extend across said rancho; said parallel lines to be 80 rods apart, measured along the township or section lines running through said rancho from east to west, so as to divide the entire area included between each pair of east and west section lines, prolonged as aforesaid, into four lots of equal width, extending across said ranch from north to south; these four lots, being further subdivided by the center line aforesaid, were to be numbered alternately on the northerly and southerly sides of said center line; and it was agreed by and between the said plaintiff and defendant Williams that plaintiff should have the odd-numbered lots, and the defendant the even-numbered lots thereof, as their respective shares of said rancho, to be released and quit-claimed by each to the other, respectively, with the exception of lots Nos. 15 and 18, upon which plaintiff and defendant Williams, respectively, had decided, and have since placed their residences and improvements; it being agreed between the said parties that plaintiff should have seventy-two rods of lot No. 15, and defendant Williams should take the whole of lot No 18, and the remaining eight rods of lot No. 15 aforesaid. The plaintiff, and defendant Williams, located a portion of the center line aforesaid for an avenue, and placed their improvements upon the lots aforesaid as nearly as the same could be ascertained under existing surveys."

It is then averred "that no regular, or correct, survey has been made of the subdivision, or lines, of said rancho as aforesaid"; that Williams has been, and is, engaged in disposing of various lots of land in the rancho, "and measuring them off himself as the lots to which he would be entitled under the agreement aforesaid"; that the measurements have been made

without the plaintiff's consent, and are incorrect, and that the plaintiff has requested Williams to join him in securing some competent surveyor to subdivide the rancho in accordance with the agreement, which Williams has refused to do; and the plaintiff asks that the land be partitioned in accordance with the alleged agreement, which, it is averred, can be done without injury to either party.

In his answer, Williams denies that he and the plaintiff own, or hold, the whole, or any part, of the rancho as tenants in common, or that they have any joint or common interest therein, or in any part of it. Proceeding, he alleges that prior to the making of the contract with Glassell and Chapman for the purchase of the property, he and plaintiff verbally agreed that immediately upon making the contract they would divide and partition the land equally, and would exchange deeds when they should receive title, and "that said agreement was a part of the consideration and inducement upon which the defendant Williams acted when he entered into said agreement with said plaintiff for the purchase of said rancho from said Glassell and Chapman."

The answer then sets out that immediately after the execution of the contract for the purchase of the rancho, the plaintiff, and the defendant Williams, entered into possession, "and agreed mutually between each other how, and in what manner, they would divide and partition said rancho between themselves, and reduced said agreement to writing. That said agreement is in words and figures as follows, to wit:

"This article of agreement made the 1st day of ——, A. D. 1876, between Jacob L. Lanterman and Adolph W. Williams, both of La Cañada, in the County of Los Angeles, State of California, witnesseth: That the parties have mutually purchased, and do now divide, the U. S. grant La Cañada by mutual consent and agreement, as follows: First, commencing the division of said grant by drawing a line from the grant boundary line, at a point at or near its center, to a point 80 rods east of township line between townships twelve (12) and thirteen (13) west, San Bernardino meridian, said line running north 64 degrees west; thence north 61 degrees 5 minutes west, to (or as near as practicable for a highway) its intersection line between sections 35 and 34, township 2 north, 13 west, S. B.

M.; thence to the west boundary line of said grant to a point where the section line between sections 19 and 20 of said township intersect said west boundary line; the above grant center line is to be deemed the center dievial line between the north and south half of said grant; that all lots shall face upon it; that it shall be a highway line for a road four rods wide, to be known as "Michigan Avenue"; that it is also to be, as far as practicable, the water line of said grant; that said grant is divided into forty-six lots; lot No. one being the north-east lot, and lot No. two the south-east lot; No. forty-five (45) the north-west lot, and No. forty-six the south-west lot. All are equally numbered, odd and even, on both sides of the avenue. That all the odd-numbered lots are Dr. J. L. Lanterman's, and that all the even-numbered lots are A. W. Williams's; that lot No. fifteen (15) is seventy-two (72) rods east and west in width, and lot number eighteen (18) is eighty-eight (88) rods in width east and west. That lot eighteen has equal rights in the waters of lot (15) fifteen, and equal duties and rights of way to spring, to repair, husband, and carry one-half (½) of said waters. That all waters (save those wells dug by parties on their own lots,) that can be found on said grant, procured for it, or conveyed on it, are of equal rights, interest, and duties. That all highways, and roads, on said grant are of equal duties; that for the purpose of taxation the grant remains, as at present, taxable in a body; each party, or their representatives, to pay one-half (½) of the entire assessment, taxes, or other legal charges. That all lots (save the six above referred to, viz., 1, 2, 15, 18, 45, and 46) are 80 rods wide east and west, and all face on the avenue, and are all bounded by said center line, and the grant line on the north and south, and east and west by north and south township, section, quarter-section, or half quarter-section lines, adopting for said north and south lines only the posts now found on said grant, established by Mr. Norway; but expressly rejecting and protesting to said Norway's grant lines as false and nonconformable to U. S. patent for said grant. That when a deed is taken by us, or our representatives, either by payment in full for said grant, or by partial payment and mortgage, we will, and our representatives shall, deed to the other freely and fully their interest by original purchase to all those lots belong-

ing by the above agreement to either party, and that so long as we have mutual rights and interests in said grant we will, with God's help, deal kindly and justly each with the other.

"In witness whereof, we have hereunto set our hands and seals, date and place first above written.

"A. W. WILLIAMS. [Seal.]"

The next averment of the answer is, that the plaintiff *refused to execute* this agreement, and it is then alleged, that immediately after taking possession of the land, plaintiff, and defendant Williams, commenced the division pursuant to their agreement, and actually and completely partitioned it, and "that a map was made correctly representing said division and partition into lots of said rancho as actually made and agreed upon by the plaintiff and the defendant Williams," and that actual possession was taken by the respective parties of their respective portions. A cross-complaint was filed by the defendants, containing substantially the same averments as are found in the answer, and the defendants asked that the Court by its decree "confirm the division and partition of said rancho as actually made by the plaintiff and the defendant Williams, in accordance with said contract as above particularly set forth"; that the Court decree that the map referred to is a correct representation of the grant as partitioned by and between the plaintiff and Williams, and that it be made a matter of record: that the plaintiff be compelled to execute to Williams a good and sufficient deed for all the even-numbered lots marked upon the map; that the plaintiff be compelled "to disclose what waters he has discovered and found upon said grant, and procured for it, and allow the defendant Williams an equal right and interest thereto, upon his performance of the conditions imposed in said contract; that whatever waters may be found on said grant, procured for it, or conveyed on it, by either plaintiff or said defendant Williams, be decreed by this Honorable Court to be for their equal right and interest, upon their performing the conditions in said contract set forth"; and the Court below so decreed, and also gave defendant judgment for attorney's fees in this action, and for one hundred dollars damages for plaintiff's failure to deed to the defendant the even-numbered lots.

The decree cannot be sustained for several reasons, but it will be sufficient to state one.

The plaintiff and Williams made the contract for the purchase of the rancho on the 16th of December, 1875, and went into immediate possession. The title was conveyed to them in December, 1877. The agreement between them for the partition of the land was a parole agreement, for both the answer and cross-complaint expressly allege that the written contract therein set out was never executed by the plaintiff, but that, on the contrary, he refused to execute it. The parole agreement for the partition was clearly invalid. All of the evidence shows an absence of the essential requirements to a valid partition of that character. Williams himself testified: "The map of partition was made in the month of December, 1875, and January, 1876. The agreement of partition was made at indefinite periods between the time of the purchase and March 1st, 1876. I give you the outside limits. It was made at different times, and from different sections of the agreement, which have all to be discussed. I cannot tell when it was finally made, but it was completed before the last of February, 1876. * * * All of the subdivision lines of the lots marked on the map have not been surveyed. Every lot which lines upon the avenue has been surveyed. The avenue has not been surveyed through, but all the practical part of the grant, the east half, from the mountain to the Arroyo Seco, was. There are two or three miles there that has been surveyed; some portions of it remained unopened, but the Doctor's flags remained standing. I should think three miles of the avenue has never been run west. It is impossible for you to locate every one of those lots without an instrument. I could take the stakes and lines, and locate every one of them. I should do it by triangulation. The lines of those lots are not marked on the ground. Some are, and some are not. At the time my deposition was taken I said I could find twenty-three lots readily without the use of an instrument. I could find every one without the use of an instrument. With a board and thread I could find them by triangulation. I only know where twenty-three are that I have been on. I know where they are by sight, and triangulation, and surveying, by running various lines. * * * Q.—Does the Doctor (plaintiff) know where his lots are? A.—His sources of knowledge are equal to mine. I didn't say when

my deposition was taken that no one else could find them unless they had my full notes. I said most any one else could find them. By the aid of the field-notes any surveyor could find them, even if these lines were obliterated. If Mr. Norway's posts were gone, he could go to my field-notes and restore them. * * * Q.—Have you any knowledge as a surveyor? A.—Such as I might have acquired by a military education in part, and some practice of it in the field. Some practice before marriage, but none since, except in the army. * * * Q.—You have studied surveying? A.—Yes, sir; I can tell whether my instrument varies by taking an observation of the astra polaris, or perhaps any other star, and I can tell whether my instrument is in order, and I can tell when any magnetic variations occur—how much it would be. I can tell when there is local attraction."

The foregoing is only a portion of the testimony of the defendant Williams, who made the map referred to, but it is enough to show beyond all question that the agreement for the partition could not have been followed by such possession as the law makes essential to its validity. Many of the lots were never marked or located upon the ground at all, and neither of the parties could with certainty know where they were. Under such circumstances it is perfectly obvious that a separate and distinct possession by either party was an impossibility. We have no doubt of the invalidity of the alleged parole partition. (*Elias* v. *Verdugo*, 27 Cal. 421; *Long* v. *Dollarhide*, 24 id. 218; Freeman on Cotenancy and Part. § 398.)

There seems, however, to have been no necessity for this litigation. There appears to be very little, if any, difference respecting the wishes of the parties in the division of the land; and a survey sufficient to render certain the respective tracts might doubtless have been made, and deeds exchanged, for much less than the cost of the litigation. If, however, the parties are unwilling or unable to agree upon a division, the Court must divide it for them, and make such partition as to it may seem equitable and just.

Judgment and order reversed, and cause remanded for a new trial.

MORRISON, C. J., and MCKINSTRY, J., concurred.

[No. 6,702.—Department No. 2.]

TRACY ET AL. *v.* COLBY ET AL.

TRUSTEE — FIDUCIARY — ADMINISTRATOR'S SALE — CONSTRUCTIVE FRAUD. — A judge, who orders a sale, and has the power to confirm or set it aside, comes within the reason of the rule that trustees, strictly so called, and other fiduciaries, cannot make a valid purchase of any part of the estate, in respect to which they have duties to perform.

ID.—ID.—ID.—ID. — EVIDENCE — DECLARATIONS.—H. purchased land at an administrator's sale, and, on the day he received his deed, conveyed an undivided half of the land to C., the Probate Judge, who ordered and confirmed the sale, the latter paying therefor one-half of the purchase-money paid by H. In an action brought by the heirs of the intestate against H. and C.—the complaint alleging that the sale to C. was made in pursuance of an agreement, or understanding, between him and H., entered into prior to the administrator's sale—*held*, that the declarations of H., made prior to the sale, but in the absence of C., that he was about to purchase for the benefit of himself and C., were admissible in evidence.

ID.—ID.—ID.—ID.—FINDING.—In the case stated the Court found that H. conveyed to C. upon a contract and agreement, made on the day of the sale, and not in pursuance of any fraudulent contract made prior thereto. *Held*, that the finding is defective, as it does not negative the allegation that there was such a prior contract, but simply expresses the opinion of the Court that it was not fraudulent.

APPEAL from a judgment for the defendants, in the Sixteenth District Court, County of Kern. REED, J.

The facts are stated by the Court.

Stetson & Houghton, for Appellants.

The declarations of the defendant Howlett were admissible as part of the *res gestæ*. (Code Civ. Proc. § 1850.) We laid a sufficient foundation to warrant the evidence. It was held in *Smith* v. *Drake*, (23 N. J. Eq. 304) in a suit to set aside an administrator's sale, on the ground that it was made to a third person, as agent of the administrator—who, on the same day he procured the administrator's deed, conveyed to the administrator—that the facts appearing on the face of the deeds themselves were sufficient to raise the presumption that the purchase was for the administrator. (*Obert* v. *Obert*, 2 Stock. 103; *Abbot* v. *Am. H. R. Co.* 33 Barb. 595; *Riddle* v. *Roll*, 24 Ohio St. 577; White & Tudor, L. C. in Equity, Vol. 1, Part I, p. 255; *Scott* v. *Gamble*, 1 Stock. 218; *Glass* v. *Greathouse*, 20 Ohio, 506.)

Admitting that the evidence could not affect the defendant Colby, it was admissible as to the defendant Howlett.

The Political Code (§ 921) prohibits the Probate Judge from purchasing at a sale made by him in his official capacity. This is only declaratory of the law as it was before the Codes (*Davoue* v. *Fanning*, 2 Johns. Ch. 252); and it makes no difference in the application of the rule, that the sale was made at public auction, *bona fide*, and for a fair price, and that the trustee did not purchase himself, but acquired the interest through a third person. (*Michoud* v. *Girod*, 4 How. 503; *Jewett* v. *Miller*, 10 N. Y. 402; *Boyd* v. *Blankman*, 29 Cal. 19; *Guerrero* v. *Ballerino*, 48 id. 118; *The York B. Co.* v. *McKenzie*, 8 Bro. P. C. 42.) The disability does not cease the moment a sale is made, but continues so long as the party has any duty to perform in connection with the property. (*Henry* v. *Roman*, 25 Pa. 354; *Rosenberger's Appeal*, 26 Pa. St. 67; *Hockenburg* v. *Carlisle*, 5 W. & S. 350; *Den* v. *Wright*, 7 N. J. L. 175; *Romance* v. *Hendrickson*, 27 N. J. Eq. 162; *Miles* v. *Wheller*, 43 Ill. 126; *Galbraith* v. *Elder*, 8 Watts, 81, 95–6; *Stephen* v. *Beall*, 22 Wall. 340; *Walton* v. *Torrey*, Har. Ch. Rep. (Mich.) 259; *Walker* v. *Walker*, 101 Mass. 171.)

R. E. Arick, and *V. A. Gregg*, for Respondents.

The declarations of the defendant Howlett were properly excluded. No proper predicate had been laid for the question, in this, that no conspiracy had been shown, and conspiracies cannot be shown by the declarations of one party. (Code Civ. Proc. §§ 1870, 1848.) We submit, that the plaintiffs have had a fair trial, and cannot complain of immaterial errors. (*Mott* v. *Reyes*, 45 Cal. 379; *Delger* v. *Johnson*, 44 id. 182.)

SHARPSTEIN, J.:

This is an action brought by F. A. Tracy, guardian *ad litem* of the minor heirs of Thomas Baker, deceased, and the widow of said Thomas Baker, to obtain a decree setting aside certain conveyances made by the administratrix of the estate of Thomas Baker, deceased, to defendant Howlett, on the ground that the purchase made by said defendant Howlett was made

in part in the interest of defendant Colby, the then County Judge and *ex-officio* Probate Judge of Kern County.

The facts, about which there is no controversy in this case, are: that Thomas Baker died intestate; that his widow was duly appointed administratrix of his estate; that pursuant to an order of the Probate Court, of which defendant Colby was Judge, she sold at public auction, on the 2nd of December, 1874, the land described in the complaint and belonging to the estate, to the defendant Howlett; that on the 20th day of December, 1874, said sale was confirmed by said Probate Court, said defendant Colby still being Judge thereof; that on the 4th day of January, 1875, said administratrix signed, sealed, and acknowledged a conveyance of said land, but did not deliver the same to said defendant Howlett until the 28th day of January, 1875; that on the same day that said deed was delivered by said administratrix to said defendant Howlett, he executed and delivered to said defendant Colby, who was still Judge of said Probate Court, a deed of an undivided one-half of said land, for which he paid to said defendant Howlett one-half of the sum which the latter had paid for the whole of said land.

It is alleged in the complaint, and denied in the answer, that said last-mentioned conveyance was made pursuant to some agreement, or understanding, between said defendants, entered into prior to the sale of said land by said administratrix. Upon this issue the finding of the Court is in favor of the defendants.

On the trial the plaintiffs called as a witness one Julius Chester, who testified that he was acquainted with the defendants, and that on the day of the sale of said land by said administratrix he had a conversation with the defendant Howlett in regard to his purchase of said land. The plaintiffs' counsel then asked the witness some questions, so framed as to elicit from him what defendant Howlett at that time said about any one being interested with him in his said purchase. These questions were objected to, on the ground that no proper predicate had been laid, "in this, that the allegations in the complaint are a conspiracy between the defendants, and it has not been shown that the defendants were both present at the conversation offered to be introduced." The objection was sustained, and plaintiffs excepted. Thereupon plaintiffs offered "to prove by

witness that on the day of the Baker estate sale, and before the sale took place, defendant Howlett came to witness, and in a conversation then had with him, told witness that he (Howlett) was going to bid in certain land at said sale, and that the purchase was to be made for and in the interest of himself and defendant P. T. Colby." The action of the Court upon this offer is stated as follows: "Offer refused by the Court, because the proper predicate has not been laid, showing that P. T. Colby, the defendant, was present, or had knowledge of such offered conversation." Plaintiffs excepted. If the evidence offered was material, its rejection cannot be sustained. The rule "admitting the declarations of a party to the record in evidence applies to all cases where the party has *any interest* in the suit, whether others are joint parties on the same side with him or not." (1 Greenleaf's Ev. 172.)

As to the materiality of the evidence offered, we entertain no doubt. The defendant Howlett is not shown to have occupied any position which forbade his purchasing property for himself at said administratrix's sale; and the sale to him can be avoided only by proving that some person who could not, upon well-established principles, be permitted to purchase, or participate in the purchase, of said property at such sale, was interested in the purchase made by Howlett. If the defendant Colby stood in such a relation to the estate of the deceased, as would render a sale of any part of it to him voidable at the instance of the heirs of said estate, then a purchase by him and another person jointly would make the whole sale voidable. It became therefore of the first importance that the plaintiffs should prove that Howlett was not buying for himself alone, but that he was buying for himself and Colby jointly. And the declarations of Howlett, at the time and place of the sale, to that effect, taken in consideration with his subsequent conveyance of an undivided half of the property which he purchased, to the defendant Colby, would, if not otherwise satisfactorily accounted for, tend very strongly to prove that both were interested in the purchase nominally made by one of them. And if such were found to be the fact, the heirs of the estate would be entitled to have the sale set aside. That trustees, strictly so-called, and administrators, executors, solicitors, and assignees, of a bank-

rupt, cannot make a valid purchase of any part of the estates in respect to which they have duties to perform, is too well settled to admit of argument. And if a judge, who orders a sale, and has the power to confirm or set it aside, is within the reason of the rule, it is not of the slightest importance that in the enumeration of persons to whom the rule applies, courts and text-writers have not specifically mentioned judges. There is, however, one reported case which has been brought to our attention, in which the rule was applied to a judge of probate. In *Walton* v. *Torrey*, (Harrington's Mich. Ch. Reps. 259) a sale was set aside on the ground that the judge who ordered the sale became interested in the purchase. The objection to an administrator purchasing at a sale of the estate, upon which he is administering, is, that it places him in a position where his interest may clash with his duty. The objection applies with equal, if not greater, force to the purchase, by a judge, of property which he has ordered to be sold, and the sale of which he must confirm before any title can pass.

Besides, a sale of this character is a judicial sale, in which the person conducting the sale is the mere organ of the Court. "A bid offered to the person conducting the sale is a *bid offered to the Court*, and a bid accepted by such person is a bid *accepted by the Court*, for its future consideration, and judicial determination, in confirming, or refusing confirmation of, the sale." (Rorer on Judicial Sales, § 23.) Any evidence, therefore, having a tendency to prove that the defendant Colby was interested in the bid of the defendant Howlett, was admissible on the trial of this action. And the admissions and declarations of Howlett to that effect were clearly admissible. The finding of the Court "that on the 28th day of January, 1875, the said John Howlett conveyed one undivided half of said lands to P. T. Colby, (co-defendant) upon a contract and agreement made on that day, and not in pursuance of any fraudulent contract made prior thereto," is defective. It leaves room for an inference that the conveyance might have been made pursuant to an agreement entered into prior to the administratrix's sale, which, in the opinion of the Court, was not *fraudulent*. If such an agreement was entered into before said confirmation, it is wholly immaterial whether it was *actually* fraudulent or not. The find-

ing should be that the conveyance was, or was not, made pursuant to an agreement made between the defendants prior to the confirmation of the administratrix's sale.

A Judge cannot act in an action, or proceeding, in which he is interested. (Code Civ. Proc. 170; *People* v. *De la Guerra*, 24 Cal. 73; *Dimes* v. *Proprietors of Grand Junction Canal*, 3 House of Lords Cases, 759.)

Judgment reversed, and cause remanded for a new trial.

THORNTON, J., and MYRICK, J., concurred.

[No. 496.—In Bank.]

PEOPLE *v.* HODGDON.

CRIMINAL LAW—PRACTICE—BILL OF EXCEPTIONS.—The case was tried by one judge, and the motion for new trial heard by his successor in office. *Held*, on appeal from a judgment of conviction and an order denying a new trial, that the bill was properly settled and authenticated.

CONSTRUCTION OF STATUTE.—Where a statute is ambiguous, such a construction will be given to it as not to deprive a party of a substantial right.

EVIDENCE—CRIMINAL LAW—DYING DECLARATION.—It is essential to the admissibility of a dying declaration, that it appear that it was made under a sense of impending death; and where it appears that the deceased had any expectation or hope of recovery, however slight it may have been, and though death actually ensued within an hour afterward, the declaration is not admissible.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Fourth District Court, City and County of San Francisco. The judgment by MORRISON, J., and the order by EVANS, J.

The facts are stated in the opinion.

Alexander Campbell, for Appellant.

The Attorney-General, for Respondent.

ROSS, J.:

The defendant was indicted for the crime of murder, committed upon the person of one Emma C. Downs. A trial was

had in the late District Court of the Fourth Judicial District in and for the City and County of San Francisco, while the Hon. Robert F. Morrison was the Presiding Judge of said Court, which trial resulted in the rendition of a verdict on the 14th day of October, 1879, finding the defendant guilty of murder in the second degree. Subsequently Judge Morrison resigned his position as Judge of said Court, and the Hon. O. P. Evans was appointed in his stead. A motion for a new trial was duly made in said cause, on behalf of the defendant, which motion came on for hearing before Judge Evans on the 29th day of December, 1879. The motion was denied, and judgment was thereupon entered against the defendant. Thereafter the defendant prepared and served upon the District Attorney a bill of exceptions, which bill was, on the 25th day of February, 1880, settled and allowed by the last-named Judge in words and figures following: "The foregoing bill of exceptions, prepared by the attorney for the defendant, was presented to the District Attorney, and he having failed to suggest any amendments thereto, but, on the contrary, having informed me that the same is a true bill, now, therefore, I, Oliver P. Evans, the Judge before whom the motion for a new trial was heard in said cause, do hereby settle, certify, and allow the foregoing as a correct bill of exceptions. Dated this 25th day of February, 1880. OLIVER P. EVANS, Judge of the Superior Court of the City and County of San Francisco." The appeal is from the judgment of conviction and from the order refusing a new trial.

It is claimed on behalf of the People, that the bill of exceptions cannot be considered here, on the ground that it was not settled by the Judge who tried the cause. The sections of the Code relating to the settlement of bills of exceptions in criminal cases are as follows:

"Section 1171.—Where a party desires to have the exceptions taken at the trial settled in a bill of exceptions, the draft of the bill must be prepared by him and presented, upon notice of at least two days to the District Attorney, to the Judge for settlement, within ten days after the trial of the cause, unless further time is granted by the Judge, or by a Justice of the Supreme Court, or within that period the draft must be delivered

to the Clerk of the Court for the Judge. When received by the Clerk he must deliver it to the Judge, or transmit it to him at the earliest period practicable. When settled, the bill must be signed by the Judge, and filed with the Clerk of the Court."

"Section 1172.—Exceptions may be taken by either party to a decision of the Court or Judge upon a matter of law:

"1. In granting or refusing a motion in arrest of judgment.

"2. In granting or refusing a motion for a new trial.

"3. In making, or refusing to make, an order after judgment, affecting the substantial rights of the parties."

"Section 1173.—Exceptions may be taken by the defendant to a decision of the Court upon a matter of law.

"1. In refusing to grant a motion for a change of the place of trial.

"2. In refusing to postpone the trial on motion of the defendant."

"Section 1174.—Where a party desires to have the exceptions mentioned in the last two sections settled in a bill of exceptions, the draft of a bill must be prepared by him and presented upon notice of at least two days to the adverse party, to the Judge, for settlement, within ten days after the order or ruling complained of is made, unless further time is granted by the Judge or by a Justice of the Supreme Court, or, within that period the draft must be delivered to the Clerk of the Court for the Judge. When received by the Clerk, he must deliver it to the Judge or transmit it to him at the earliest period practicable. When settled, the bill must be signed by the Judge and filed with the Clerk of the Court. If the Judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the Supreme Court to prove the same; the application may be made in the mode and manner, and under such regulations, as that Court may prescribe; and the bill, when proven, must be certified by the Chief Justice as correct, and filed with the Clerk of the Court in which the action was tried, and when so filed it has the same force and effect as if settled by the Judge who tried the case. If the Judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may, nevertheless, settle such bill, or the

party may, as provided in this section, apply to the Supreme Court to prove the same."

The only difficulty in determining the question arises from the concluding clause of the section relating to exceptions taken to an order refusing a new trial: "If the Judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may, nevertheless, settle such bill, or the party may, as provided in this section, apply to the Supreme Court to prove the same." It does not seem to have occurred to the framers of this clause that the Judge who presided at the trial and the Judge who determined the motion for a new trial might, as here, be different individuals. The first portion of the section, however, provides that where a party desires to have the exceptions taken to an order refusing a new trial settled in a bill of exceptions, "the draft of a bill must be prepared by him and presented, upon notice of at least two days to the adverse party, to the Judge for settlement," etc. The "Judge" here spoken of is manifestly the Judge who should determine the motion for a new trial. It must be admitted that the section is somewhat ambiguous, but we think we ought not to give it such a construction as would deprive a party of the right to be heard upon a bill which has been settled and allowed as correct by the Judge who heard and ruled upon the motion, and who was therefore competent to certify to its correctness, and especially when one provision of the section clearly admits of such construction. The objection to the consideration of the bill will therefore be overruled.

At the trial, there was offered by the prosecution and admitted in evidence by the Court, against the objection and exception of the defendant, a paper purporting to be the dying declaration of the deceased, which paper is in these words:

"Dying statement of Mrs. Emma Downs. Believing I am very near death, and realizing that I may not recover, I wish to make this, my dying statement, as to the cause of my death; and I now, in the presence of these witnesses, charge Mrs. Hodgdon, on Howard street, between Sixth and Seventh streets, with having been the sole cause of my death; in that she did at three several times, and lastly, that on yesterday, the 14th day of March, 1878, did use an instrument or implement on my person for the purpose of and producing an abortion, and

that she and no other person is to blame in the matter. This being my voluntary statement. MRS. EMMA DOWNS.

"Witness: F. B. H. Wing, M. D.; John Wagner, M. D.

"San Francisco, March 15th, 1878."

There was error in admitting this paper in evidence as the dying declaration of the deceased. It is essential to the admissibility of such declarations that it appear that they were made under a sense of impending death. It is the *impression* of almost immediate dissolution that renders the testimony admissible. "Therefore," says Mr. Greenleaf, in his work on Evidence, "where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterward, the declaration is inadmissible. On the other hand, a belief that he will not recover is not in itself sufficient, unless there be also the prospect of 'almost immediate dissolution.'" This is the rule recognized and approved by all of the authorities. The only difficulty that arises comes from the application of the rule to the facts of the particular case. In the case before us, however, we think it appears upon the face of the paper itself that the deceased had not abandoned all hope of recovery; and this cannot be made plainer than by a repetition of the words themselves: "Believing that I am very near death, and realizing that I *may* not recover, I wish to make this my dying statement," etc. There is here a clear indication that the deceased, at the time of making the declaration, had not abandoned all hope of recovery. The declaration was therefore inadmissible. (1 Greenleaf on Ev., § 158; Wharton's American Law of Homicide, pages 306–7–8; *Rex* v. *Woodcock*, 2 Leach's Cr. Cases, 267, 566; *People* v. *Sanchez*, 24 Cal. 24.)

In the last case cited, this Court said: "This species of testimony should always be received with the greatest caution, and too much care cannot be observed by the Court in scrutinizing the primary facts upon which its admissibility is grounded. No person is entirely exempt from a disposition to excuse and justify his own conduct, or to inflict vengeance upon one at whose hands he has suffered a grievous wrong: and in the eye of the law this proclivity is presumed, in cases like the present, to be overcome and silenced only by the presence of almost im-

mediate death. An undoubting belief existing in the mind of the declarant, at the time the declarations are made, that the finger of death is upon him, is indispensable to that sanction which the law exacts; and if it shall appear, in any mode, that there was a hope of recovery, however faint it may have been, still lingering in his breast, that sanction is not afforded, and his statement cannot be received."

On the trial, evidence was introduced, on behalf of the prosecution, tending to show that during the afternoon of the 14th of March, 1878, the deceased, accompanied by one Mrs. Wilkinson, visited the house of the defendant; that deceased went into the parlor of the defendant, and there told her that the operation had failed; that defendant expressed surprise, and then invited deceased to go up stairs with her; that defendant and deceased remained up stairs some 15 or 20 minutes, when they came down, and Mrs. Wilkinson and the deceased left the house; that deceased looked pale, and had a purple spot on one side of her face when she came down stairs; that she vomited twice while on her way home, and immediately after arriving there went to bed complaining of great pains in the head and in the region of the abdomen; that about 6 o'clock P. M., defendant was sent for and prescribed for the deceased; that deceased was delivered of a fœtus at 12 o'clock on that night; that she continued to get worse, and at 5 o'clock the next morning the deceased sent her husband for the defendant, who again visited and prescribed for the deceased, and on leaving stated that she would return in the afternoon, when she expected to find deceased a great deal better; that when asked whether it would be better to send for another physician, defendant said she thought it unnecessary, and when she left she carried the fœtus away with her; and that she never did return to visit the patient.

The defendant, in testifying in her own behalf, after denying that she performed the operation with which she was charged, and admitting that, at the request of the deceased, she had made certain examinations upon her person and prescribed for her, said: "When I left at my last visit I told them that I would come back in a short time, and when I went home I told my son that I would like to have him go with me. I told him what I suspected on seeing the fœtus, and asked him if he would go

with me in an hour or two, or as soon as he could." In answer to a question by her counsel as to whether or not she went, the defendant replied: "Before I got ready to go, Mr. Downs came and told me ——" At this point the District Attorney interposed an objection, and the Court ruled that the witness might state that Mr. Downs told her *something* by reason of which she did not go, but refused to permit her to state what it was that Downs told her. To this ruling the defendant reserved an exception, which we think well taken. The prosecution had shown that the deceased was ill, and that the defendant had been attending her as her physician, and that on leaving, on the occasion of her last visit, defendant had said she would return very soon, but did not return at all. This circumstance, unexplained, might have been considered by the jury as a suspicious circumstance, tending to show guilt on defendant's part; and the latter, in order, if she could, to do away with any inference or suspicion to her injury that might have been drawn from her failure to return to her patient under the circumstances appearing, had the right to show *why* she did not return. This she could not fairly do by saying it was because of *something* deceased's husband told her, without showing what that something was.

For the errors committed in the particulars alluded to, the judgment and order must be reversed. It becomes therefore unnecessary to pass upon the other questions presented by the counsel for the defendant.

Judgment and order reversed, and cause remanded for a new trial.

THORNTON, J., MCKINSTRY, J., SHARPSTEIN, J., MYRICK, J., and MCKEE, J., concurred.

[MORRISON, C. J., took no part in the decision of this cause.]

[No. 6,697.—Department No. 2.]

THE PEOPLE EX REL. TRACY v. BRITE.

OFFICE—VACANCY—SUPERVISOR.—Under § 996 Political Code, an office becomes vacant, *ipso facto*, upon the incumbent ceasing to be an inhabitant of the district (if the office be local) for which he was elected, or within which the duties of the office are required to be discharged; and a successor may be appointed without a previous adjudication that the office is vacant. So *held*, in an action for usurpation of office brought by the People, upon the relation of one who had been duly appointed and qualified as Supervisor of a certain district, against a subsequent appointee of the County Judge to the same office.

ID.—EVIDENCE—ERROR.—*Held further*, in the same action, that it was error to admit in evidence a petition of numerous persons for the appointment of the defendant, wherein it was stated that the relator had ceased to be an inhabitant of the State, and the judgment reversed on that account.

APPEAL from a judgment for the defendant, in the Sixteenth District Court, County of Kern. REED, J.

The facts are stated in the opinion.

Jo. Hamilton (Attorney-General), *V. A. Gregg*, *Geo. E. Otis*, and *S. L. Cutter*, for Appellant.

There is no allegation that the office of Supervisor for the district was ever declared vacant. The office could not be declared vacant without a hearing. (Const. art. 1, § 8; *People* v. *Wells*, 2 Cal. 204; Broom's Leg. Max. 113.)

J. W. Freeman, and R. E. Arick, for Respondent.

MYRICK, J:

This is a proceeding to test the right of relator to the office of Supervisor of the Third District, Kern County. The relator was elected November 7th, 1876, and duly qualified and entered upon the duties of the office November 20th, 1876. Respondent claimed the office under appointment by the County Judge, of September 24th, 1877. The appointment by the County Judge was based upon the fact that Tracy had "ceased to be an inhabitant of the said district, and his office had thereby become vacant." No judicial proceedings had been had to declare a vacancy. The question then is, whether proceedings

must first be had to declare a vacancy, or whether an appointment can be made if the fact of vacancy exist.

Section 996, Political Code: "An office becomes vacant on the happening of either of the following events before the expiration of the term: * *

"5. Upon the incumbent ceasing to be an inhabitant of the district, (if the office is local) for which he was chosen, or within which the duties of the office are required to be discharged."

There are instances named in the section, where proceedings must be had to ascertain the alleged fact, before an appointment of a successor can be made; but the case in hand is not one of them. When the relator ceased to be an inhabitant of the Third District, he ceased to be Supervisor for that District, and a vacancy occurred.

The issue of vacancy or not can be, and is to be, determined in this case. The relator has his day in Court in this action upon that issue, and we see no necessity of a previous adjudication. The Legislature was competent so to enact, and, as we have stated, has so enacted.

The relator objected to the regularity of proceedings in the appointment of the respondent; but, in our opinion, the objection is not tenable. However, upon the trial, the respondent offered in evidence a paper purporting to be signed by various parties, requesting the County Judge to appoint the respondent to the office vacated, which paper recited that "said Tracy has ceased to be an inhabitant of said district," etc. This paper was admitted in evidence, notwithstanding the objection of the relator. This was error. The appointing power was with the County Judge, and the petition was entirely irrelevant for any purpose. The petition was not necessary to call the appointing power into action. The recital in the petition that Tracy had ceased to be an inhabitant of the district was not, on the trial, evidence of the fact, and we cannot say how far the jury was influenced in the verdict by the recital. Substantially the same recital appears in the order of appointment, but that paper was admissible. If any part was inadmissible, the relator should have objected to that, or the Court would, on request, have instructed the jury that the recital in the order, that the

relator had ceased to be an inhabitant of the district, was not evidence.

Judgment reversed, and cause remanded.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 6,407.—Department No. 1, and in Bank on Petition for Rehearing.]

ALDRICH *v.* WILLIS ET AL.

GUARDIAN—EXECUTOR—WILL.—A testamentary executor or guardian cannot act as such until he qualifies, and letters are issued to him: until then his acts are void.

ID.—ADMINISTRATOR DE SON TORT—INFANT.—One wrongfully intermeddling with the property of an infant is sometimes held by equity as a guardian, (as in the case of an administrator *de son tort*) for the purpose of an accounting; but he acquires none of the rights.

MORTGAGE — ACCEPTANCE — DELIVERY — EXECUTOR — GUARDIAN—TRUSTEE — INFANT.—A testator bequeathed to his niece, A. W., (a minor) the proceeds of certain lands, but provided that the said proceeds might be used to pay a debt of his brother, H. W. (father of A. W.), and that in such case H. W. should give a mortgage upon his farm, to secure the repayment of the money.

An executor and guardian of A. W. was appointed by the will, who was authorized to appoint a successor, and who, after having qualified, resigned his trust, and appointed H. W. as executor and guardian; and H. W. thenceforth acted as such, but without qualifying or receiving letters.

H. W. having come into the possession of the bequest to A. W., and appropriated the same to his own use, executed to her, to secure its repayment, a note and a mortgage upon his farm; and caused the latter to be recorded; but the note and (except for the purpose of being recorded) the mortgage were never out of his possession, and were never delivered to A. W. or to any person for her, otherwise than as above stated; and H. W., acting as guardian, afterward entered satisfaction of the mortgage on the record; but the same was, in fact, not paid.

Afterward H. W. borrowed money of the plaintiff's assignor, and executed another mortgage on his farm to secure it.

In an action to foreclose the latter mortgage, in which A. W. was made a party defendant, *held*, (by the Department) that H. W. never became executor or guardian of A. W.; but that, having received her money, he became her trustee, and that, having spent it, his mortgage to her was valid; and, being for her benefit, that the fact of its being set up in her answer, by her guardian *ad litem*, and relied upon and proved in the case, was sufficient evidence of its delivery and acceptance, and that the satisfaction entered by H. W. was void; and *held further*, (by the Court in bank and on petition for rehearing) that the mortgage was given in compliance with the terms of the will, and that a voluntary acceptance by the infant was unnecessary, since the law compelled her acceptance; that she took under the will, and was bound by its terms.

ID.—EQUITABLE ASSIGNMENT—SUBROGATION — PLEADING—FINDING. — Prior to the mortgage to A. W., H. W. had mortgaged his farm to one H., and this

mortgage, by agreement with the plaintiff's assignor, was paid out of the moneys loaned by him, and it was claimed by him that the transaction constituted an equitable assignment of the H. mortgage, and that he was entitled to be subrogated to the rights of H.; but *held* that, as he did not sue as assignee of H., but only to foreclose his own mortgage, the question could not be considered, and that any finding upon the subject was outside of the issues.

APPEAL from a judgment for the plaintiff in the Eighteenth District Court, County of San Bernardino. MCNEALY, J.

Action for the foreclosure of a mortgage for the sum of $3,000, executed May 21st, 1874, by Henry M. Willis to H. L. Drew, and by the latter assigned to the plaintiff. The complaint alleges (besides the usual allegations) that the defendant, Amelia Willis, claims that prior to this mortgage, (to wit, March 20th, 1874) Henry M. Willis had made his note and a mortgage on the same land to her, to secure the repayment of money received by him as her guardian, and appropriated to his own use; but the complaint alleges that the said note and mortgage were never accepted on behalf of said Amelia (who was then a minor seven years old) by any court, tribunal, or person, and that the actions of the said Henry M. Willis as her guardian were not, in that or any other respect, ever ratified by any person, court, or tribunal; and that thereafter, and before any acceptance thereof, the said Henry M. Willis canceled the said mortgage of record. The complaint further alleges that, prior to both of said mortgages, another mortgage upon the same land had been executed by Willis to one Hubbell, upon which there was due at the date of the Drew mortgage about $2,400, and which was paid out of the money borrowed from Drew, under the agreement that the Drew mortgage should stand in the place of the Hubbell mortgage, and be a first lien upon the land.

The answer of Amelia Willis sets up the mortgage executed to her by Henry M. Willis, and alleges that the same was duly recorded on the day of its execution, and has never been paid or satisfied, and claims that it constitutes a prior claim to the mortgage of the plaintiff. It also denies the alleged agreement between Henry M. Willis and Drew with reference to the Hubbell mortgage.

The material facts of the case, as found by the Court, are as follows:

On the 27th of May, 1871, one Edwin A. Willis, (brother of Henry M.) died, and by his will bequeathed to his niece, Amelia, the proceeds of certain land, which he directed should be sold by his executor. The will further directed that out of the proceeds the executor should (in a certain contingency) pay off a certain mortgage on the farm of his brother Henry (the same land covered by the mortgages aforesaid); and that in case this was done, the executor should take a mortgage from his said brother on his farm, for the benefit of the said Amelia, for the money so paid. The will appointed one N. J. Pishon, as executor and as guardian of the said Amelia, and authorized and empowered him to appoint any other suitable person, in his place, as such executor and guardian. The will was duly probated, and Pishon qualified as executor and guardian, but afterward resigned, and appointed as his successor Henry M. Willis, who entered upon the discharge of his duties as such guardian and executor, and continued to act as such until the date of the trial; but without qualifying or receiving letters.

Afterward, Pishon and Henry M. Willis sold the land referred to in the bequest, and the purchase-money, amounting to the sum of $3,170, was paid to Willis, and was by him appropriated to his own use; and to secure the repayment of this money, he executed to the defendant, Amelia Willis, the note and mortgage referred to in the pleadings: the latter was duly recorded on the day of the execution.

Afterward, to wit, on the 26th day of April, 1875, Henry M. Willis, acting as guardian of the defendant Amelia, caused to be entered of record in the Recorder's office a satisfaction of the said mortgage; but in fact the note secured by the mortgage was never paid.

On May 1st, 1875, Henry M. Willis borrowed of the plaintiff's assignor, Drew, $3,000, and to secure the same executed the mortgage sued upon; and a portion of the money thus borrowed, (viz., $1,800) was used to satisfy the Hubbell mortgage, but there was no agreement or understanding between the parties to the mortgage, except that the Hubbell mortgage should be paid out of the proceeds of the loan.

Amelia Willis, at the time of the execution of the mortgage to her, was a minor, seven years old, living with and under the control of her father, Henry M. Willis; and in executing the note and mortgage, Henry M. Willis acted wholly under the will, and without any agreement with Amelia, or with any person, court, or tribunal in her behalf; and the note and mortgage was in the possession of Henry M. Willis from the time they were executed until the commencement of the action; and were never delivered to the said Amelia, or to any person, court, or tribunal for her, except so far as causing said mortgage to be recorded was a delivery.

J. D. Boyer, for Appellant.

The Court finds that it, the mortgage to respondent, was never delivered, except so far as causing it to be recorded was a delivery. This is equivalent to a finding that there was no delivery. (*Barr* v. *Shroeder*, 32 Cal. 616; *Parmelee* v. *Simpson*, 5 Wall. 81; *Younge* v. *Guilbeau*, 3 id. 636; *Hawkes* v. *Pike*, 105 Mass. 560; *Maynard* v. *Maynard*, 10 id. 456; *Jackson* v. *Phipps*, 12 Johns. 418; *Woodbury* v. *Fisher*, 20 Ind. 388; 3 Wash. on R. P. 254, 264–5; *Lessee of Mitchell* v. *Ryan*, 3 Ohio St. 387; *Hulick* v. *Scovil*, 9 Ill. 159; *Bennett* v. *Waller*, 23 id. 97.) The Court found as an ultimate fact that the guardian, acting as such, caused the mortgage of respondent to be discharged of record. It makes no difference whether the mortgage was in fact paid or not: on this point the record is conclusive.

The plaintiff was entitled to be subrogated to the rights of Hubbell under the first mortgage. (*Carr* v. *Caldwell*, 10 Cal. 384; *Swift* v. *Kraemer*, 13 id. 530; *Dillon* v. *Byrne*, 5 id. 456; *Birrell* v. *Schie*, 9 id. 104; *Himmelmann* v. *Schmidt*, 23 id. 117; Bouvier's L. D., title "Subrogation.")

C. W. C. Rowell, for Respondent.

The receipt of the proceeds of the sale of the testator's estate, by H. M. Willis, constituted him a trustee; and their application was in strict conformity with the directions of the will. (2

Perry on Trusts, §§ 511 b, 511 c, 783; 2 Daniel's Ch. 1362; 2 Story Eq. Jur. § 1356; 1 id. 511.)

The pretended satisfaction of the mortgage was void on its face, and imparted notice to every one of its absolute nullity. (5 Curt. Dec. 476; 16 id. 191; 13 N. Y. 592; 1 Perry on Trusts, §§ 203–4 *et seq.*; 44 Cal. 112; 49 id. 292; Civ. Code §§ 250, 2230, 2243, 2244.)

McKINSTRY, J.:

Defendant Henry M. never became executor of the estate of Edwin A. Willis, deceased. He did not qualify, nor were letters testamentary issued to him. Nor was he guardian of the person, or property, of the infant, Amelia Willis, Jr. True, one wrongfully intermeddling with the property of an infant is sometimes held by equity as a guardian, but only (as in the case of an *administrator de son tort*) for the purpose of an accounting; he acquires none of the rights of a guardian. Pishon was appointed testamentary guardian—an office not in itself assignable, because a personal trust. If, however, it could be held that the policy of our law will permit a testator to provide by his will that a testamentary guardian therein appointed may delegate his powers, Henry M. never gave bond, nor qualified, as required by § 1758 of the Code of Civil Procedure.

Nevertheless, Henry M. Willis was a trustee, holding the moneys of the infant, Amelia, Jr., which came into his hands in trust for her. The mortgage executed by him to secure such moneys was altogether for her benefit, and the fact that it is set up in her answer by her *guardian ad litem*, and relied upon herein, constitutes sufficient proof of delivery to and acceptance by her.

The Court below found that there was no registered *satisfaction* of the mortgage to Amelia, Jr., other than one "caused to be entered" by defendant Henry M. Willis, "acting as guardian." We understand this to be a finding that the marginal satisfaction purports to be executed by him *as* guardian. Whether, however, his pretended character appears upon the record is immaterial, since he was not in fact guardian. The record then showed an attempted satisfaction of a mortgage by

the *mortgagor*, and plaintiff's assignor took with full notice that the prior incumbrance had not been satisfied.

It is urged by counsel, that inasmuch as it was agreed between the assignor of plaintiff and defendant, Henry M. Willis, that the Hubbell mortgage should be paid out of the moneys loaned by the former, and the sum was paid then and there, the transaction operated an equitable assignment of the Hubbell mortgage; that the instrument sued on is in legal effect a continuation of the Hubbell mortgage, and, to the extent that the money loaned was used to pay off the Hubbell incumbrance, plaintiff should be decreed priority over the mortgage to Amelia Willis, Jr. Any finding on that subject, however, is entirely outside of the issues made by the pleadings, and one conclusive answer to the proposition of counsel is, that plaintiff has not sued as assignee of the Hubbell mortgage, but has brought this action to foreclose the mortgage to Drew.

Judgment affirmed.

MORRISON, C. J., and ROSS, J., concurred.

THORNTON, J. (in bank, on petition for rehearing):

The petition for a rehearing before the Court in bank in this case is denied.

The second paragraph of the opinion of Department No. 1 is in these words: "Nevertheless, Henry M. Willis was a trustee holding the moneys of the infant Amelia, Jr., which came into his hands in trust for her. The mortgage executed by him to secure such moneys was altogether for her benefit, and the fact that it is set up in her answer by her *guardian ad litem*, and relied upon (*and proved*) herein, constitutes sufficient proof of delivery to and acceptance by her." To which we desire to add, "and this must be so, since if it (the mortgage) had not been for the benefit of the infant, the Court below, it must be presumed, as it had control over the conduct of the *guardian ad litem*, would not have allowed him to set it up." (Story's Eq. Jur., § 1349-1353 inclusive; *Sanford* v. *Head*, 5 Cal. 297; *People* v. *Houghtaling*, 7 id. 348; *People* v. *Davidson*, 30 id. 379; *Dougherty* v. *Creary*, id. 290; *Joyce* v. *McAvoy*, 31 id. 279, *et seq.*)

The words "*and proved*" in parenthesis in the above quoted paragraph are inserted by us to indicate the proper construction of the former opinion.

We are further of opinion that the facts as found show that the mortgage as taken was in exact compliance with the terms of the will, and in that view, a voluntary acceptance by the infant was unnecessary—since the law compelled her acceptance. She takes under the will, and is bound by its terms. (*Morrison* v. *Bowman*, 29 Cal. 346.

Whether Henry M. Willis was guardian or not we consider immaterial. The same result follows whether he (Willis) was or was not the general guardian of the infant Amelia Willis.

SHARPSTEIN, J., MYRICK, J., MCKEE, J., and MCKINSTRY, J., concurred.

[No. 6,265.—Department No. 2.]

ESTATE OF BARTON.

ESTATES OF DECEASED PERSONS—ADMINISTRATOR—ACCOUNT.—The appellant was appointed administrator of the deceased, but the order was afterward reversed on appeal. *Held*, that he was not entitled, upon accounting, to an allowance for attorney's fees and costs expended by him in the contest.

ID.—ID.—ID.—Upon a contest for the administration, the estate certainly should not bear the expense of the losing party; and the question stated but not decided, whether it should bear the expense of the winning party.

ID.—ID.—ID.—COMMISSIONS.—There is but one aggregate sum to be allowed as commissions for administration; and in case of a change of administration, the Court has no basis upon which to make an apportionment between the administrators, until the close of the estate. The outgoing administrator is therefore entitled upon the settlement of his account only, to commissions for the portion of the estate fully administered by him, and for his proportion of the balance of the commission must wait until the final settlement of the estate.

APPEAL from an order for settlement of an administrator's account, in the Probate Court of Los Angeles County. STEPHENS, J.

The facts are stated in the opinion.

Thompson & Ellis, and *W. P. Gardiner*, for Appellant.

The appellant should have been allowed the attorney's fees and costs paid by him. (*Estate of Miner*, 46 Cal. 572; *Estate of Simmons*, 43 id. 548; Code Civ. Proc. § 1616.) He should also have been allowed a fair proportion of the commissions for administration. (*Ord* v. *Little*, 3 Cal. 289; *Estate of Simmons*, cited *supra*; Code Civ. Proc. § 1618.)

Thom & Ross, for Respondent.

The appellant was not entitled to an allowance for attorney's fees and costs. (*Estate of Simmons*, 43 Cal. 547; *Estate of Gasq*, 42 id. 288.)

Upon a change of administrators, the first is entitled only to such proportion of the commission as the Court may deem right and proper. (*Ord* v. *Little*, 3 Cal. 289.)

MYRICK, J.:

The will of testator omitted to name an executor. There was a contest on the application for letters of administration with the will annexed, between J. E. Griffin, appellant herein, on the one side, and Perdue (one of the devisees) and Rowland on the other. The Probate Court decided in favor of Griffin, and appointed him administrator. Perdue and Rowland appealed from that order, upon which appeal the order of the Probate Court was reversed. Upon the going down of the remittitur, Griffin was removed, and Perdue and Rowland were appointed. The matters involved in the present appeal arose during the time that Griffin was administrator, and relate to items contained in his account rendered for settlement. In the contest and on the appeal, Griffin paid $275 to attorneys for services rendered on his behalf, and $9.20 for printing brief. These items were objected to, and were disallowed by the Court below. We think this ruling was correct. The question involved in the contest and appeal was as to who should administer, and thus receive the commissions. The estate—that is, the creditors and devisees—was not, as such, at all interested. It was a controversy between Griffin on one side, and Perdue and Rowland on

the other, and the estate should not bear the expense, certainly of the losing party. Whether the other parties will have their expenses paid out of the estate, will have to be determined if they shall present the same in their account. (Leading Cases in *Equity*, vol. 2, part 1, pages 548, 552, edition of 1877, and cases therein cited.)

The property of the estate was appraised at: Moneys, $2; real estate, $7,650; and Griffin received for wood $25, and collected on a debt $40.37. He leased the land for the year 1877, and received therefor $950. He also leased the land for the year 1878 for $950, but was removed before the rent became due. He charged commissions on the appraised value of the real estate, and on the rental to be received for the year 1878. These items the Court disallowed, but allowed him $100 for the care of the real estate. We do not see how he could have been allowed full commissions on any property that he did not fully administer upon. The real estate still remains unadministered, the rental uncollected. He will probably hereafter be entitled to a proper proportion of the commissions on the value of the real estate, but there is now no rule by which the Court can say that his share of the percentage should be so much, and his successors' share, or their successors', so much.

The Court, in allowing him $100 for the care of the real estate, was doubtless of opinion that he would, in any event, be entitled to that sum; but where there is no claim for compensation for extraordinary services, we do not see that an outgoing administrator is legally entitled to any certain, definite share of commissions upon property not yet administered. We cannot say upon how much he shall receive seven per cent., upon how much five per cent., or how much four per cent. In all these matters his successors have a right to be considered. There is but one aggregate sum to be allowed as commissions, and that sum must be properly apportioned by the Court. The Court has no basis upon which to make an apportionment until the close of the estate. At the close of the administration the apportionment can be made.

We are aware that this Court, in *Ord* v. *Little*, 3 Cal. 289, said that "in such a case, it is the duty of the Probate Court to examine into the nature and value of the services rendered, and

comparing as well as possible that which has been done with what yet remains to be done in the course of administration, to apportion the compensation which has been fixed by law for the whole, according to sound judgment"; but we think that the true rule is stated in the paragraph immediately preceding the above quotation, viz.:

"Where an administrator resigns or is removed, leaving the administration incomplete, there is no fixed rule of compensation for the services he has rendered." And in the *Estate of Miner*, 46 Cal. 564, following that rule, the Court said that the commissions are to be ascertained when "*the estate is ready for distribution.*" We scarcely see how sound judgment can determine how much the first administrator is entitled to unless it knows and considers what the successor has done, and what the comparison is between his acts and those of his predecessor. The administration of an estate is an entirety; there may be different persons in office at different times, or at the same time; but the claim of each to compensation must be considered with reference to the rights of each and all of the others.

Of course we are not considering the right of the outgoing administrator to commissions upon property which has been by him fully administered upon. In such case, his successor has no right to share in the commissions upon that property.

The order of the Court below should be modified so as to reserve the rights of the appellant, as above indicated, and is affirmed in all other respects. So ordered.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 6,701.—Department No. 2.]

TRACY ET AL. v. CRAIG ET AL.

PLEADING—ANSWER—PRACTICE—FINDING.—The answer of one of the defendants failed to deny a material fact alleged in the complaint, but the answer was not demurred to, nor was any motion made for judgment on the pleadings; and the case was tried, as if he, like the other defendants, had sufficiently denied the allegations of the complaint; and the findings were in favor of the defendants generally. *Held*, that it was error in the Court to find in favor of the defendant referred to upon an allegation of the complaint which he did not deny.

EVIDENCE.—Certain evidence referred to in the opinion held to have been erroneously excluded.

TRUSTEE—FIDUCIARY—ADMINISTRATOR'S SALE—CONSTRUCTIVE FRAUD.—For its views upon the main question involved in the case the Court refers to the opinion in *Tracy* v. *Colby*, 55 Cal. 67.

APPEAL from a judgment for the defendants, in the Sixteenth District Court, County of Kern. REED, J.

The facts are stated in the opinion.

Stetson & Houghton, for Appellants.

Defendant Jewett admitted the allegations of the complaint. The finding of fact contradicting such admission must be disregarded, and the judgment must follow such admission contained in the pleadings. (*McDonald* v. *M. V. H'd Ass'n*, 51 Cal. 211; *Devoe* v. *Devoe*, id. 543; *Putnam* v. *Lamphier*, 36 id. 158.) A finding is useless and idle, unless the facts found are within the issues, and a judgment based upon such findings cannot be sustained. (*Morenhout* v. *Barron*, 42 Cal. 591; *Gregory* v. *Nelson*, 41 id. 286.) The objection may be taken upon appeal from the judgment. (*Putnam* v. *Lamphier*, cited *supra*.) The findings must be disregarded as to defendant Jewett, as contradicting the admission of the pleading. (*Burnett* v. *Stearns*, 33 Cal. 469; *Hill* v. *Den*, 54 id. 6.)

On the main question the counsel cited the same authorities as in *Tracy* v. *Colby*, 55 Cal. 67.)

V. A. Gregg, and *R. E. Arick*, for Respondents:

Cited the same authorities as in *Tracy* v. *Colby*, *supra*, 67.

SHARPSTEIN, J.:

This is an action to have the sale of a portion of the estate of Thomas Baker, deceased, set aside upon the same grounds as were alleged in *Tracy* v. *Colby*, 55 Cal. 67, for setting aside the sale of another portion of that estate. The plaintiffs in both cases are the same, and Colby, the County Judge and *ex-officio* Probate Judge of Kern County, is a defendant in each case. In this case it is alleged in the complaint, that defendants Craig and Jewett bid off the premises at the administratrix's sale, (which the plaintiffs seek to avoid) for themselves, Colby and Sinclair, jointly. After the sale, confirmation, and conveyance to defendants Craig and Jewett, they conveyed to each of the other defendants an interest in the land so purchased at said sale. Whether or not, as between defendant Colby and the other defendants, or any of them, there was any agreement or understanding, prior to the confirmation of the sale to Craig and Jewett, that Colby should have an interest in the land so purchased at the administratrix's sale, is the real point in controversy. The plaintiffs allege, in substance, that at some time before the administratrix's sale took place, the defendants had arranged among themselves that the real property described in the complaint should be purchased at the administratrix's sale by some one or more of their number, and thereafter held and disposed of for the common benefit of all of them. The defendants, Craig, Colby, and Sinclair, answer jointly, and deny that Colby had any interest, or that there was any agreement or understanding between him and the other defendants, or any of them, that he should have any interest in the land bought at said administratrix's sale, until after the confirmation of said sale.

The defendant Jewett filed a separate answer, in which he denies "that he fraudulently conspired and contrived, with his codefendants herein, or with any of them, for the purpose of defrauding," etc., and denies that he "made fraudulent or any arrangements, as alleged in the complaint, or any fraudulent, or any arrangements whatsoever, in fraud of the rights of said estate," and much more to the same effect.

The vice of his answer is that he nowhere unqualifiedly de-

nies that there was any agreement or understanding between the other defendants and Colby, prior to the confirmation of the sale, that he should have an interest in the land purchased at said sale. But his answer was not demurred to, nor was there any motion for judgment upon the pleadings as to him. On the other hand, the case was tried as if he, like the other defendants, had sufficiently denied that allegation of the complaint. The findings and judgment of the Court were in favor of the defendants generally. But it was error for the Court to find in favor of defendant Jewett upon an allegation of the complaint which he did not deny. Jewett was called as a witness on behalf of plaintiffs, and gave some testimony tending to prove that he and the other defendants had been jointly interested in land purchased at a foreclosure sale, and also in land purchased at an administratrix's sale of the Baker estate. As the two transactions seemed to be connected, we think that plaintiffs were entitled to have answers to the following questions, to which objections were made by defendants, and sustained by the court, viz.:

"Did Mr. Sinclair, one of the defendants, purchase land at that foreclosure sale?"

"Did F. W. Craig and P. T. Colby, pursuant to the agreement you have testified to, make purchases of land at the foreclosure sale held in June, 1874?"

"Were there at any time an arrangement, or agreement, or understanding, between yourself and defendants Craig, Sinclair, and Colby, or any one of them, that you and Mr. Craig should purchase in the lands at the administratrix's sale purchased by yourself, defendants Craig, Colby, and Sinclair, at the mortgage sale, in the interest of yourself, defendants Colby and Sinclair?"

"Has any of the lands purchased by you or Mr. Craig at said administratrix's sale been by you or Craig sold to any other parties?"

"Have you at any time since the administratrix's sale, and before the deeds of December, 1877, offered in evidence, were made, had any conversation with defendants Colby, Craig, and Sinclair, or either of them, relative to the manner in which the land described in the complaint was held by you and them?"

"What do you mean by saying that the purchase made by Mr. Colby, of the lands in suit, was subsequent to the confirmation of the probate sale? Do you mean that a contract of purchase was made, or simply that a conveyance was made by you to Colby?"

The plaintiffs excepted to the rulings of the Court in sustaining defendants' objections, and we are satisfied that said rulings were erroneous. All questions which were calculated to elicit answers which would throw any light upon the transactions of the defendants in regard to the lands involved in the action should have been allowed.

Our views upon the main question involved in the case were expressed in *Tracy* v. *Colby*, before referred to in this opinion, and it is unnecessary to repeat them.

Judgment reversed, and cause remanded for a new trial.

THORNTON, J., and MYRICK, J., concurred.

[No. 6,762.—Department No. 2.]

MANLY *v.* HOWLETT.

FINDINGS.—Where the findings are contradictory upon a material point, the judgment cannot be sustained. So *held*, where both the complaint and answer alleged possession in the defendant, and the Court found that all the allegations of the latter were true, and all the allegations of the former were untrue.

GIFT—PART PERFORMANCE—SPECIFIC PERFORMANCE—PLEADING—EJECTMENT—EQUITABLE DEFENSE.—A parole gift of land, followed by possession and improvement of the land by the donee, is so far executed as to entitle the donee to a specific performance; but *held*, in an action of ejectment, by the grantee of the donor, that the defense must be specially pleaded.

STATUTE OF LIMITATIONS—PATENT—LEGAL TITLE—STATE LANDS.—In a suit for the recovery of land, after the issuance of the patent, the Statute of Limitations cannot be held to have commenced running prior to the date of the patent.

APPEAL from a judgment for defendant, and from an order denying a new trial, in the Sixteenth District Court, County of Kern. REED, J.

The facts are stated in the opinion.

Stetson & Houghton, for Appellant.

The Court erred in admitting evidence as to the alleged parole gift by Chester to Howlett. An equitable defense must be specially pleaded. (*Sherman* v. *McCarthy*, 5 P. C. L. J. 58; *Hartley* v. *Brown*, 46 Cal. 202.)

It is well-settled in this State that the Statute of Limitations does not begin to run until the issue of the patent. (*Gardiner* v. *Miller*, 47 Cal. 570; *Galindo* v. *Wittenmeyer*, 49 id. 12; *Gibson* v. *Chouteau*, 13 Wall. 92; *Huston* v. *Walker*, 47 Cal. 484; *Duke* v. *Thompson*, 16 Ohio, 34; Code Civ. Proc. §§ 318, 319; *Treadway* v. *Wilder*, 12 Nev. 108; *Vansickle* v. *Haines*, 7 id. 249.)

V. A. Gregg, for Respondents.

The statute runs from the date of the certificate. Section 1925 Code of Civil Procedure provides that a certificate of purchase is primary evidence that the holder thereof is the owner of the land described therein.

MYRICK, J.:

This is an action of ejectment to recover the possession of two lots of land situate in Bakersfield, Kern County, together with rents and profits. Plaintiff alleges that on the 11th of December, 1878, he was, has been ever since, and is, the owner, and is entitled to the possession of the lots, and that on that day defendants were, since have been, and are, in the adverse, wrongful, and exclusive possession of the lots. The answer of defendant Howlett denies the ownership of plaintiff, admits his own possession, alleges that he is lawfully in possession, denies the damage and the value of the rents and profits to be $100 per month, and denies every other allegation of the complaint. Defendant alleges that plaintiff's cause of action is barred by §§ 318 and 319 Code of Civil Procedure, and that he (Howlett) is the owner, and has been in the open, notorious, and exclusive possession, under claim of title, exclusive of every other right, ever since November, 1871, and that he has paid all taxes.

The Court filed its findings of fact as follows:

1st. That each and every allegation of plaintiff's complaint are untrue.

2nd. As to the rents and profits.

3rd. That the defendant Howlett is the owner, and entitled to the possession of the property described in the complaint.

4th. That defendant Howlett has been in the open, notorious, and exclusive possession of the property, with a claim of title, (being a gift from Julius Chester, in August, or September, 1871) since November, 1871, holding the same adverse to plaintiff, his ancestors, predecessors in interest, and grantors.

5th. As to payment of taxes.

6th. That plaintiff's action is barred by §§ 318 and 319 Code of Civil Procedure, defendant having held said property adverse to him more than five years immediately preceding the commencement of the action.

7th. That the allegations of defendant Howlett's answer are true.

Upon these findings judgment went for defendant. Plaintiff moved for a new trial, which was denied, and plaintiff appealed.

Without directly passing upon the sufficiency of each of these findings, as findings of facts, which seem to us to be quite insufficient, the judgment based upon them cannot stand. In the first finding the Court found that "each and every allegation of plaintiff's complaint are untrue"; among other allegations, that defendants, on the 11th of December, 1878, were, and since have been, and are, in the adverse and exclusive possession of the land; and in the 7th finding the Court found that "all the allegations of defendant Howlett's answer are true," viz., that he (Howlett) is, and has been, in the exclusive possession of the property ever since November, 1871. In other words, plaintiff's allegation that Howlett was and is in possession is untrue, but Howlett's allegation that he was and is in possession is true. Howlett's defense was based on two propositions, viz., a gift, and the Statute of Limitations, to either of which possession was essential; therefore, the Court should have found whether, or not, he was in possession. When findings are directly antagonistic, it cannot be said that either finding is correct, or, at least, which is correct.

Other matters appear in the transcript, and as the case must go back for a new trial, we will refer to them.

The plaintiff claimed title deraigned as follows: A certificate of purchase issued by the Register of the State Land Office, (swamp and overflowed lands) June 6th, 1870, to Baker; deed, Baker to Livermore and Chester, January 4th, 1871, and from Livermore and Chester, July 3rd, 1873, and by mesne conveyances to plaintiff, December 7th, 1878; State patent to Baker, December 12th, 1877. The suit was commenced January 7th, 1879.

Defendant claimed on the trial, (though the defense was not set up in his answer) that in August, or September, 1871, Chester made a parole gift of the land to him, and that in November, 1871, he took possession, made some improvements, and during succeeding years made considerable improvements, and has been in the continued occupation of the premises, claiming title. Defendant pleaded the Statute of Limitations, and relied also upon his exclusive adverse possession of more than five years. Plaintiff objected to these defenses. 1st. That the estoppel, or equitable defense, has not been pleaded. 2nd. That the Statute of Limitations did not begin to run until the issuance of the patent, December 12th, 1877, the suit having been commenced after that, and being founded upon it.

In regard to a gift of land by parole, it was held in *Freeman* v. *Freeman*, 51 Barb. 306, that when the owner of land gave the same by parole to another, who went into possession of the land, and occupied it, made improvements, and paid a portion of the taxes, it was a gift so far executed as to entitle the donee to a specific performance. In the case at bar this defense was not pleaded. Even if it had been pleaded, it would not have justified the judgment, for the reason that at the time of the alleged gift Livermore and Chester were joint owners of whatever right had then accrued from the State; it is not claimed that Livermore joined in the gift, and, therefore, no more than Chester's interest could have passed.

In regard to the Statute of Limitations, we are of opinion that the certificate of purchase did not pass the title *as title*; subsequent acts were to be performed by Baker, before he would be entitled to the patent, viz., payment of the annual in-

terest, and of the deferred purchase-money. The title was in the State until the issuance of the patent.

It is true that before the patent should issue, the Statute of Limitations might build up a title in the possessor as between the parties, so as to determine their rights upon the *then* condition of things; but the issuance of the patent gave new rights; the patentee and his grantees then had a right superior to any theretofore owned or held by them, viz., the ownership of the land. They then had something which the State had not theretofore parted with. In a suit for the recovery of the land, commenced after the issuance of the patent, the Statute of Limitations cannot be held to have commenced running prior to the date of the patent. (47 Cal. 570; *Hagar* v. *Speet*, 48 id. 406; 49 id. 12; *Henshaw* v. *Bissell*, 18 Wall. 255.)

Judgment and order reversed, and cause remanded for a new trial.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 6,687.—Department No. 2, and in Bank.]

BAKERSFIELD TOWN HALL ASSOCIATION *v.* CHESTER.

CORPORATION.—In an action by a *de facto* corporation, claiming in good faith to be a corporation under the laws of this State, and doing business as such, *held*, that the question of the due incorporation of the association could not be inquired into.

STATUTE OF LIMITATIONS—GIFT—EQUITABLE TITLE—ADVERSE POSSESSION.—A gift may be made of real estate, if possession is given and taken under the gift, and acts done by the donee to carry out the purpose of the gift. In such case the donee acquires the equitable title, and is entitled to a specific performance; or he may, by adverse possession, acquire the legal title.

ID.—SUCCESSIVE POSSESSION—PRIVY.—Several parties signed an agreement to form a joint-stock company to build a public hall and Odd Fellows' Lodge, in the town of Bakersfield, and, a parole gift of land having been made to them for the purpose, they took possession thereof, and commenced building. Afterward, a corporation was formed, in pursuance of the agreement, to which the possession was transferred. In an action of ejectment, by a corporation, in which it appeared that there had been a continuous adverse possession by the parties signing the written agreement, and the corporation, for more than five years before the ouster, *held*, that the plaintiff was entitled to recover.

Appeal from a judgment for the plaintiff, in the Sixteenth District Court, County of Kern. Reed, J.

According to the complaint, and the findings, the ouster complained of took place on or about January 1st, 1877.

The other facts are stated in the opinion.

Stetson & Houghton, for Appellant.

To recover upon possession alone, the plaintiff must show that he has paid all the taxes for five years. (Code Civ. Proc. § 325.) The complaint alleges an ouster on January 1st, 1877. The association could not have entered into possession earlier than May 6th, 1872, the day its articles were recorded.

V. A. Gregg, for Respondent.

Myrick, J.:

This is an action of ejectment to recover two town lots in the town of Bakersfield. Judgment was rendered for plaintiff, and defendant appealed.

Plaintiff relies upon parole gift from Thomas Baker, and occupation for more than five years. Defendant relies upon title acquired by a deed from Thomas Baker to G. B. Chester, dated October 23rd, 1869, recorded August, 1870, and from G. B. Chester to Julius Chester, (defendant) dated January 3d, 1873, recorded January, 1876.

The evidence given by plaintiff tended to prove that in the fall of 1871, several residents of Bakersfield, wishing to erect a hall for public purposes, signed an agreement as follows:

"The undersigned agree to form a joint-stock company to build a public hall, and Odd Fellows' Lodge, in the town of Bakersfield, and will take the number of shares attached to our names in the capital stock, to consist of 300 shares of $10 each, payable when the entire amount is taken. The company to be formed on the express condition that no assessment shall ever be made on the shares of stock."

Among the signers were Julius Chester 50 shares, Thomas Baker 20 shares, G. B. Chester 5 shares, who were also actual

promoters of the enterprise. A building committee was appointed, who employed a builder. The understanding was, that Thomas Baker was to donate two lots upon which the building was to be erected; and in that view he went upon and pointed out lots 7 and 8, and had them staked off. The lots were then worth about $25 each. The building was commenced November 9th, 1879. Both the Chesters participated in the meetings held, in the collection of subscriptions, and in the sale of materials; both knew that the building was being erected for the purpose and on the lots indicated, and neither made any claim of ownership of the lots. In the winter of 1872, one of the subscribers objecting to paying his subscription, unless the title had passed, Julius Chester said he would get a deed, or have a deed from Baker to the association, put on record when the second story was completed. During all this time it was generally understood that the title was still in Baker. The building was completed in April, 1872, occupying a portion of each lot, and the upper story was at once occupied by Masonic and Odd Fellows' lodges, as tenants of the association, and such occupation continued to the time of trial. The lower story was used as a public hall for public meetings, and was rented by the association for various purposes, such as dramatic troupes, skating-rink, shows, lectures, etc., rents being paid to and received by the association. On the 20th of May, 1872, articles of incorporation were signed by nine persons, including Julius Chester, the name of the corporation to be "Bakersfield Town Hall Association"; the object to be, "to own, hold, control and lease a certain hall situate in said town of Bakersfield." Five trustees were named, one of whom was Julius Chester. The articles were acknowledged May 20th, 1872, and on the same day were recorded in the office of the County Recorder, but were not filed in the office of the County Clerk. The association thence continuously occupied the building as above stated, and claimed in good faith to be a corporation under the laws of this State, and did business as such. Defendant was at one time president of the association; both the Chesters knew of its affairs and business. In the latter part of 1877, defendant entered into and took possession of the lower story of the building, and excluded the association therefrom, and this suit was thereupon brought.

Defendant seeks to have the judgment reversed, and alleges that plaintiff is not a corporation, its articles not having been filed in the office of the County Clerk; and that he is the holder of the legal title; and that in an action of ejectment, the equitable rights of plaintiff, if there be any, cannot be adjudicated.

Section 6 of the act concerning corporations (Hitt. Gen. Laws, art. 751) contained the proviso, "that the question of the due incorporation of any company, claiming in good faith to be a corporation under the laws of this State, and doing business as such corporation, or of its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party."

This proviso has been referred to in various decisions by this Court, viz.: *Rondell* v. *Fay*, 32 Cal. 354; 26 id. 286; *O. & V. R. R. Co.* v. *Plumas Co.* 37 id. 354. In the latter case the point was distinctly presented, and Mr. Justice RHODES, delivering the opinion of the Court, uses the following language: "Many of the acts required to be performed in order to make a complete organization of the corporation may have been irregularly performed, or some of them may have been entirely omitted, and the rule of the statute is, that such irregular or defective performance shall not defeat the incorporation when drawn into question collaterally. The omission of the names and number of the first trustees from the articles of association, the failure to file a duplicate of the articles of association with the Secretary of State, * * insufficient acknowledgment, are irregularities that will not defeat the corporation. A substantial compliance with the requirements of the statute will be sufficient." (See, also, *S. & L. G. R. Co.* v. *S. & C. R. R. Co.* 45 Cal. 680.) The Court says: "The plaintiff was a corporation *de facto* at all events, and, as such, was in the undisputed possession and control of the road. * * In this condition of things, defendant entered upon the road along Weber Avenue, and took it into possession, and now undertakes to defend this action on the ground that the plaintiff was not a corporation *de jure*. * * We think that, under such circumstances, the title of the plaintiff cannot be inquired into by defendant, who is a mere intruder." It is sufficient if the company claims in *good faith* to be a corporation under the laws of this State, and is

doing business as such corporation. In the case at bar, these two essentials clearly appear. The parties signed and acknowledged articles of incorporation stating the object, name, duration, amount of capital stock, place of business, the number of trustees, and named those to act for the first three months. They attempted to file the articles, but filed them with the wrong officer. The association took possession of the property and did the business named in the articles. We think that the question of the due incorporation of the association, or its right to exercise corporate powers, cannot be inquired into in this action. The Court below found that the articles of incorporation were, and had been "for several years, in the custody of the County Clerk of Kern County, and among the archives of his office." We see no evidence to support this finding; but, from the views above expressed, it is immaterial whether the finding in that respect was supported or not.

The testimony, as above stated, tended to show that defendant and his grantors, even if they had the legal title, were not in possession of the premises at any time from November 9th, 1871, until the latter part of 1877; on the contrary, that in November, 1871, the parties subsequently incorporating took possession of the premises, with the knowledge and consent of Baker, Chester, and Chester, and held the same until May 20th, 1872; and that, from that day, the association exclusively held and possessed the same, claiming to be the owner, with the knowledge and consent of Baker, Chester, and Chester, not as a tenant of them, or either of them; and so held and possessed the same until the entry of defendant in the fall of 1877. The above was specially found by the Court, except that the finding dates the entry of defendant in November, 1876. This gave title to plaintiff, and it was entitled to recover.

Judgment affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

By the COURT (in bank, on petition for rehearing):

The application that this case be heard in bank is denied. A gift of real estate may be made by parole, if possession is given and taken under such gift, and acts done by the donee to carry

out the purpose of the gift. (*Freeman* v. *Freeman*, 51 Barb. 306; 43 N. Y. 34.) The donees took possession in November, 1871, and erected the building for the purposes expressed in their agreement, and when the corporation was organized, it succeeded to the rights of the donees, thus making the possession for five years from November 9th, 1871, adverse to the defendant, and vesting title. The gift, though in form by Baker, was, in effect, the gift of G. B. Chester and J. Chester as well; it transferred an equitable title from Baker, Chester, and Chester, which would entitle the donees and their successors to have a decree giving them the legal title; or they could, by adverse possession, acquire such legal title.

[No. 7,148.—Department No. 1.]

JOHNSON *v.* SQUIRES.

STATE LANDS—CONSTRUCTION OF STATUTE.—Act of March 27th, 1872, for the relief of purchasers of State lands, was retrospective in its operation, and did not apply to future cases. *Held*, accordingly—where a defective application for the purchase of State lands was made before, but the certificate of purchase was issued, and payment for the land made, after the passage of the act—the application was not cured by the act.

ID.—ID.—CONSTITUTIONAL LAW.—By § 3 of art. xvii of the Constitution, "lands belonging to this State which are suitable for cultivation, shall be granted only to *actual settlers*," and this provision operates as well on applications made before, as those made after the Constitution took effect.

APPEAL from a judgment for defendant in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

Action to determine a contest as to the rights of the parties to purchase a tract of State land, referred to the District Court by the Register of the Land Office. The application of the defendant was made March 14th, 1868, and the certificate of purchase issued July 24th, 1873. The other facts are stated in the opinion.

H. T. Hazard, for Appellant.

The defendant's application was a nullity, and could not be

cured by any curative act. (*Rooker* v. *Johnston*, 49 Cal. 5; *Middleton* v. *Low*, 30 id. 605.)

R. M. Widney, for Respondent.

The transcript shows that the plaintiff has not, and never can have, under existing facts, any right to purchase the land. To none but actual settlers can sales be made. (Const. § 3, art. xvii; § 1, art. xxii; *McDonald* v. *Patterson*, 54 Cal. 245; *Lamb* v. *Schottler*, id. 319.)

MCKINSTRY, J.:

The parties have stipulated that the affidavits on which was based the application of respondent complied neither in form nor substance with the requirements of the Act of March 28th, 1868. Respondent is not, therefore, entitled to purchase under the provisions of that act. (*Hildebrand* v. *Stewart*, 41 Cal. 337; *Cunningham* v. *Crowley*, 51 id. 128.) Nor does his come within the class of cases provided for in the curative Act of March 27th, 1872. (Stat. 1871–2, 622.) Even if the language of the first section of that act were ambiguous, the title illustrates its purpose—"*An act for the relief of purchasers of State lands.*" It is difficult to believe, if the Legislature had intended to change the machinery by which such lands might thereafter be acquired, and to amend the law so that applications need no longer be accompanied by certain affidavits, that they would not in terms have amended the prior statute. If the Act of 1872 be construed as an amendment of the previous act, it is apparent that those applicants who have since complied with the previous act *as amended*, require no "relief." To maintain the position of respondent we must declare that the Legislature did by the act last cited amend the previous statute; but this we cannot declare, when to the improbability of an amendment so indirectly arrived at, is added a consideration of the title of the act —in itself totally inapplicable to *future* applications.

The application of plaintiff, we may assume, complied in form and substance with the law in existence when it was made. Yet we cannot determine that he is entitled to purchase, in view of the prohibitory provision of the Constitution: "Lands belong-

ing to this State, which are suitable for cultivation, shall be granted *only to actual settlers.*" (Art. xvii, § 3.)

This language is clear and explicit, and operates as well on applications made before as after the Constitution took effect. As the case shows, appellant has paid no portion of the purchase-money, nor has his proposition to buy been accepted by the agent of the State. He has parted with nothing of value, and can neither assert that the State Constitution has "impaired the obligation" of a *contract*, or deprived him of property "without due process of law." It is admitted by the stipulation—constituting part of the findings—"At the date of the application of Squires, (defendant and respondent) neither plaintiff, nor anyone under whom he claims, was in possession of said land or any part thereof." It does not appear from the record, however, whether either party has been in possession since January 1st, 1880. This could not appear, since the judgment of the District Court was rendered prior to that date. Nevertheless, we must declare that the land can be granted only to an actual settler. Whether the land could be granted to an actual settler who had been wrongfully dispossessed, need not now be decided. We only say that under the present Constitution the facts as to the possession of the respective parties must be "found" in all contested cases like the present.

The case must be remanded; and in the Court below, the parties may respectively take such course as they may be advised in respect to motions for leave to amend or supplement their pleadings.

Judgment reversed, and cause remanded for a new trial.

McKEE, J., and ROSS, J., concurred.

[No. 6,943.—Department No. 1.]

CURTIS ET AL. *v.* PARKS.

VOLUNTARY PAYMENT—SURETY—CONTRIBUTION.—No man can be made a debtor for money paid to his use, unless it was done at his request, or unless the party paying the money was bound as surety, or otherwise, to pay it for him.

ID.—ID.—ID.—CONSTRUCTION OF CONTRACT.—The plaintiffs, and defendant, and others—who were sureties on the bond of a Public Administrator—promised and agreed to pay to one F.—to whom their principal had become liable, as his successor in the administration of an estate—the amount of the liability; promising and agreeing each with each and all the others, that they would so pay in certain definite proportions. The plaintiffs, having paid the whole amount, brought their action against the defendant to recover the amount that he should have paid. *Held*, that under the contract alleged there was no obligation resting upon the plaintiffs to pay the defendant's part of the amount, and therefore their payment was voluntary, and gave rise to no cause of action against the defendant.

APPEAL from a judgment for the plaintiffs, and from an order denying a new trial, in the Eighteenth District Court, County of San Bernardino. MCNEALY, J.

The several sums, for which each of the sureties signed the official bond of the administrator, are set out in the complaint, and in all amount to $20,000; the amount signed for by the defendant being $2,000, and his proportionate share of the deficit of $2,800 being $280. There is no allegation in the complaint that any of the sureties had become insolvent. The other facts are stated in the opinion.

Talbott & Harris, for Appellant.

The defendant and the plaintiffs cannot be regarded as sureties on the contract sued upon. There is, therefore, but one basis upon which any amount can be figured out against the defendant, and that is on the original bond; and as on this his liability is only for $280, the demurrer should have been sustained on the ground of jurisdiction.

C. W. C. Rowell, for Respondents.

The plaintiffs and defendant mutually promised each other, in order to avoid litigation about the deficit in Rogers' accounts, each to pay his proportion of the deficit; not his pro-

portion counting the whole number of bondsmen, but the amount which each of the promisers would have to pay (after excluding certain sureties on the bond assumed by them to be insolvent). The agreement by the sureties with the administrator was joint, and each of them became jointly bound to pay the full amount. It is true the sureties agreed among themselves as to their several liabilities, but there was no severance of their liability to the administrator; and there can be no doubt that each of the sureties could have been compelled to pay the full amount. The suit must therefore be treated as one for contribution.

Ross, J.:

The plaintiffs—six in number—the defendant, and various other persons, seventeen in all, became sureties in several sums, upon the official bond of one Rogers, as Public Administrator of the County of San Bernardino. The complaint charges that afterward letters of administration in the matter of the estate of one Avaline, deceased, were duly issued to Rogers as such Public Administrator, and that on the same day, the latter entered upon the administration of said estate. That subsequently Rogers was removed, and one Fulwiler duly appointed administrator of the estate, and an order made directing Rogers to deliver to Fulwiler all moneys and other property in his hands belonging to the estate, among which was the sum of twenty-eight hundred dollars. That Rogers failed to pay over said sum, and that the sureties became liable therefor. For the plaintiffs' cause of action the complaint then proceeds as follows: "That on the (blank) day of September, A. D. 1877, plaintiffs, and Peter Filance, William Hawley, M. Katz, J. A. Rosseau, (the last four named of whom are not parties to this action, but were sureties upon the bond) and defendant, agreed and promised that they would pay the said W. B. Fulwiler, administrator as aforesaid, the sum of twenty-eight hundred dollars; promising and agreeing, each with each and all the others, that they would so pay in proportionate rate, as the total original liability of said last-named persons, to wit, plaintiffs, and Peter Filance, Wm. Hawley, M. Katz, J. A. Rosseau, and defendant, upon said of-

ficial bond of said Albert Rogers, to wit, thirteen thousand dollars, bore to the said sum of twenty-eight hundred dollars, so should the original liability of each upon said original bond bear to the sum each should pay. That defendant's original liability upon said bond was the sum of two thousand dollars, and the amount of his proportionate rate of the twenty-eight hundred dollars, the sum of four hundred and thirty and $\frac{74}{100}$ dollars gold coin. That on or upon the 1st day of December, A. D. 1877, plaintiffs paid, and fully discharged, the said sum of twenty-eight hundred dollars; and that afterward, to wit, on or about the 25th day of December, 1877, and before the bringing of this suit, plaintiffs demanded of defendant his proportion of said sum so by them paid, to wit, four hundred and thirty $\frac{74}{100}$ dollars, and that defendant has wholly refused and neglected to pay said sum or any part thereof." Wherefore, the plaintiffs brought the present action to recover, and did recover, judgment against defendant for the last mentioned sum. After carefully considering the complaint, we are unable to discover that it states any cause of action in favor of the plaintiffs against the defendant. There is no averment that the defendant ever agreed to pay the *plaintiffs* anything, or that it was understood or agreed between the plaintiffs and defendant, or any of the parties mentioned, that the plaintiffs should pay to Fulwiler the *defendant's pro rata* share of the deficit, in consideration of which the defendant should refund to plaintiffs. This is not an action upon the bond, nor one for contribution, but the action is based upon the alleged contract of September, 1877, which, according to the allegations of the complaint, did not provide for the payment by the *plaintiffs* of the defendant's *pro rata* share of the money due from the late administrator. The complaint failing to show any agreement or understanding by which the plaintiffs were authorized to pay the defendant's part, or any promise by the latter to repay, it fails to show any right in plaintiffs to recover what must be regarded, as the case is presented by the complaint, as a voluntary payment. No man can be a debtor for money paid, unless it was paid at his request. (Hilliard on Contracts, vol. 1, p. 71; 1 Parsons on Contracts, 6th ed. p. 471, and note "F," p. 273.) It follows that the judgment and order must be reversed, and the cause re-

manded, with directions to sustain the demurrer to the complaint. So ordered.

MORRISON, C. J. and MCKINSTRY, J., concurred.

[No. 6,501.—Department No. 1.]

WAKEFIELD v. BOUTON ET AL.

FINDINGS—CONFLICT OF EVIDENCE.—The findings sustained in this case, on the ground that there was a conflict in the evidence.

ID.—NEW TRIAL—PRACTICE.—The findings of the jury in an equity case are not binding on the Court, but may be set aside or disregarded by the Court without a motion for new trial.

APPEAL from a judgment for the defendant, Margaret F. Bouton, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The case was tried before a jury, who rendered a verdict on all the issues in favor of the plaintiff. The Court set aside the verdict, and found as stated in the opinion. The other facts are stated in the opinion.

A. H. Judson, and *Byron Waters*, for Appellant.

The Court erred in arbitrarily setting aside the verdict of the jury. The findings of the Court are not sustained by the evidence.

The Court also failed to find upon a material issue. It is alleged in the complaint, and denied in the answer, that the $1,000 note was made in lieu of the balance on the second note. The Court found that Bouton made the note, but failed to find for what it was given. The evidence clearly showed that the $1,000 note was given for the balance of the other note; and the law is settled that, in such case, unless the new note is intended as a payment, it remains secured by the mortgage. (2 Wash. on R. P. 173; *Dillon* v. *Byrne*, 5 id. 455–7; *Birrell* v. *Schie*, 9 id. 106; *Swift* v. *Kraemer*, 13 id. 523; *Himmelmann* v. *Schmidt*, 23 id. 120; *Barber* v. *Babel*, 36 id. 23; *Pomoroy* v. *Rice*, 16 Pick. 22; *Davis*

v. *Maynard*, 9 Mass. 245; *Watkins* v. *Hill*, 8 id. 522; *Spring* v. *Hill*, 6 Cal. 17; *Tuber* v. *Hamlin*, 97 Mass. 489–92; *Hill* v. *Beebe*, 13 N. Y. 556; *Chase* v. *Abbott*, 20 Iowa, 154; *Seymour* v. *Darrow*, 31 Vern. 122; *Bolles* v. *Chauncey*, 8 Conn. 389; *Terry* v. *Woods*, 14 Miss. 139.)

Bicknell & White, for Respondents.

The action of the jury was not binding upon the Court in any sense, or for any purpose. (*Wingate* v. *Ferris*, 50 Cal. 105.) The findings of the Court are fully sustained by the evidence, and the authorities cited by respondent do not apply. If the assignment to Mrs. Bouton had merely transferred an interest in the note equal to $2,551.36, the argument might have some force; but, as a matter of fact, she is the holder of, and owns the whole of the note, and the assignment carried with it a corresponding interest in the mortgage. (Civ. Code, § 2936; *Ord* v. *McKee*, 5 Cal. 515; *Bennett* v. *Taylor*, id. 502; *Phelan* v. *Olney*, 6 id. 479; *McMillan* v. *Richards*, 9 id. 426; *McCurdy* v. *Clark*, 27 Mich. 445; *English* v. *Carney*, 25 id. 178.)

The $1,000 note was given and accepted for the balance remaining due from Bouton after the assignment to respondent. This was a contract between Bouton and Nancy Wakefield, with which we have nothing to do.

The new obligation entered into imposed no lien upon the mortgaged premises. (*Stoddard* v. *Hart*, 23 N. Y. 556; *Grafton Bank* v. *Foster*, 11 Gray, 265.)

MCKINSTRY, J.:

The complaint is for the foreclosure of a mortgage given to secure promissory notes, described as follows:

"On the 22nd day of April, 1875, in the city of Los Angeles, County of Los Angeles, State of California, the said defendant, Edward Bouton, made his certain promissory notes in writing, bearing date on that day, by one of which notes he promised for value received to pay said plaintiff, or order, the sum of $3,108 in gold coin of the United States, with interest thereon in like gold coin at the rate of 1 per cent. per month from date until paid, which note, by the terms thereof, was payable in one

year from the date thereof; and by the other note, said defendant promised, for value received, to pay said plaintiff, or order, the sum of $3,108 in gold coin of the United States, with interest thereon in like gold coin at the rate of 1 per cent. per month from date until paid, which note, by the terms thereof, was payable in two years from date thereof."

The complaint alleges, that on the 1st day of July, 1876, said defendant paid said plaintiff the sum of $2,544.20 in gold coin of the United States, and the same was then and there, by mutual agreement of plaintiff and defendant, applied on the last described note, which was then and there surrendered to said defendant Bouton, and in lieu thereof, and for the balance due thereon, said defendant made, executed, and delivered to said plaintiff his certain promissory note for the sum of $1,000, gold coin of the United States, payable to said plaintiff, or order, in two months from the said 1st day of July, 1876, with interest thereon in like gold coin at the rate of one and a half per cent. per month until paid; which note, it was then and there agreed, should be deemed secured by said mortgage.

The plaintiff is still the owner and holder of said first and last described notes and of said mortgage.

That the whole of the principal sums mentioned in said first and said last described notes is unpaid, and no portion of the interest on either of said notes has been paid, and there is now due and unpaid from said defendant Edward Bouton to said plaintiff on said first note the sum of $3,108, gold coin of the United States, and interest thereon at the rate of one per cent. per month from April 22nd, 1875; and on said last described note there is now due and payable from said defendant to said plaintiff the sum of $1,000, gold coin of the United States, and interest thereon from July 1st, 1876, at the rate of one and one half per cent. per month.

The prayer is, that the proceeds of sale of the mortgaged premises be applied to the payment of "the amount due the plaintiff," etc.

The answer of the defendant Edward Bouton denies that the payment of $2,544.20 was on the second of the original notes, or that the same was ever surrendered to him, or that it was agreed that the $1,000 note should be secured to be paid by the mortgage.

The defendant, Margaret F. Bouton, denies that the payment was made on the second note mentioned in the complaint, or that the same was ever surrendered to E. Bouton, or that he in lieu thereof, or for the balance thereon, executed and delivered the $1,000 note; and denies, further, that on the 1st of July, 1876, or at any time, it was agreed that the $1,000 should be secured by the mortgage. Defendant Margaret F., by way of *cross-complaint*, alleges that "on the 1st day of July, A. D. 1876, said plaintiff, for a valuable consideration, to wit, the payment to her by this defendant of the sum of $2,551.36, United States gold coin, indorsed, assigned, sold, transferred, and delivered the note hereinbefore fully set forth, and which fell due on the 22nd day of April, 1877, together with said mortgage, by which the payment of said note was so secured to this defendant, who ever since then has been and is now the lawful owner and holder of said last mentioned note, and the mortgage by which the payment of the same is secured as above set forth.

"That the whole of the principal sum mentioned in the last described note is unpaid, and no portion of the interest thereon has been paid, and there is now due from said E. Bouton as principal, and said Nancy Wakefield as indorser on said note, the sum of $3,108, gold coin, and interest thereon at the rate of one per cent. per month from April 22nd, 1875.

"That this defendant, as the indorsee of plaintiff, holds a prior lien on said mortgaged premises as security for the payment of said last named note and interest, and that the interests of the other parties to this action in said mortgaged premises are all subject to said lien of this defendant."

The third, fourth, fifth, sixth, seventh, and eighth findings are as follows:

"3. That on the 1st day of July, A. D. 1876, and while she was the lawful owner and holder thereof, this plaintiff for a valuable consideration, to wit, the payment to her by the defendent, Margaret F. Bouton, of the sum of $2,551.36, in United States gold coin, which sum was then and there the separate property of said Margaret F. Bouton, indorsed, assigned, sold, transferred, and delivered the second of the hereinbefore described notes, to wit, the said note which fell due as aforesaid on the 22nd day of July, 1877, together with the said mortgage

by which the payment of the said note was so secured, to the defendant, Margaret F. Bouton, as her separate estate, who ever since then has been and is now the lawful owner and holder thereof.

"4. That the defendant, E. Bouton, on the 1st day of July, 1876, executed and delivered to the plaintiff herein his certain promissory note for the sum of $1,000, gold coin of the United States, payable two months after its said date, with interest thereon in like gold coin, at the rate of one and one-half per cent. per month until paid, and the payment of the principal sum, or the interest thereon, as mentioned in the said last named note, was not at any time secured either in whole or in part; nor was it ever agreed by or between any of the parties to this suit that the said principal sum, or interest thereon, or any part thereof, should be secured to be paid by said mortgage, or should in any way become a lien upon said mortgaged premises.

"5. That no payment of principal or interest has ever been paid upon either of the aforesaid three notes, and the same remain wholly due, unpaid, and unsatisfied.

"6. That said plaintiff is now the lawful owner or holder of the first of said notes mentioned in the complaint, and which fell due as aforesaid on April 22nd, 1876, and there is now due and owing to her thereon from the defendant, E. Bouton, the sum of $3,108, with interest from April 22nd, 1875, at the rate of one per cent. per month, all in gold coin.

"7. That there is now due and owing from said defendant, E. Bouton, on the second mentioned note described in the complaint, and which fell due as aforesaid on the 22nd day of April, 1877, to said Margaret F. Bouton, who is now the lawful owner and holder thereof as aforesaid, the sum of $3,108, with interest from April 22nd, 1875, at the rate of one per cent. per month, all in gold coin.

"8. That both the principal sum and interest due upon said two last mentioned notes of dates April 22nd, 1875, are a lien upon said mortgaged premises, and the payment of the same is secured by said mortgage."

These findings are attacked by appellant as not sustained by the evidence. If it were a question of fact to be passed upon by us as an original question, we would entertain doubt whether

the plaintiff fully understood the arrangement, and that her indorsement would operate an assignment of the note for $3,108, and *pro tanto* of the mortgage; but the Court below, before whom the witnesses appeared, found in effect that the minds of the parties met, and denied a motion for a new trial. There certainly was a conflict in the evidence, since the witness, E. Bouton, swore that he explained to witness that his wife, the defendent, Margaret F. Bouton, would not advance the money unless the security was transferred to her, and that he would require plaintiff to indorse the note (which she did) so that he could deliver it to Margaret F., to secure her. The mortgage note was not then due, and the note which he gave for the balance bore one-half per cent more interest, than did the note secured by the mortgage. It has been so repeatedly held that we will not reverse a finding of fact when there is a substantial conflict in the evidence, that it is unnecessary to do more than again call attention to the rule. What is said above applies to the finding that nothing was paid in satisfaction of the second of the notes secured by the mortgage.

It is urged that the Court below failed to find upon a material issue. The complaint alleges that the $1,000 note was given in lieu of the second note described in the complaint and for the balance thereon, and the answer denied this allegation. It is said the Court found that defendant, E. Bouton, made and delivered to plaintiff the note for $1,000, but failed to find for what said note was given. But the case shows that $1,000 was (approximately) the balance due upon the note indorsed, and the Court did find that it never was agreed between the parties that the $1,000 note should be secured to be paid by the mort gage, or should in any way become a lien on the mortgaged premises. It is alleged in the complaint, and not denied in the answers, that the $1000 note was given for the balance due on the note indorsed. The real issue, therefore, was whether that note was to be secured by the mortgage, and upon that issue the Court found as above stated.

Judgment and order affirmed.

MORRISON, C. J., and MCKEE, J., concurred.

[No. 6,575.—Department No. 1.]

BUSTAMENTE ET AL v. STEWART.

INJUNCTION—DAMAGES—ATTORNEY'S FEES.—The amount recoverable, on account of attorney's fees, in an action upon an injunction bond, is limited to fees paid counsel for procuring the dissolution of the injunction, and does not extend to fees paid for defending the entire case.

ID.—ID.—NOMINAL DAMAGES—MAXIM.—In an action upon an injunction bond, after dissolution of injunction, there being no express proof of damages, the plaintiff claimed that they were entitled to judgment for nominal damages; but *held*, that however the general rule might be, the case was a fitting one for the application of the maxim "*De minimis non curat lex.*"

APPEAL from a judgment for the defendant, and an order denying a new trial, in the Eighteenth District Court, County of San Bernardino. MCNEALY, J.

The facts are stated in the opinion.

McConnell, and *Andrew B. Paris*, for Appellants.

Nominal damages are presumed to follow from proof of breach of contract. (*Browner* v. *Davis*, 15 Cal. 9; *Attwood* v. *Fricot*, 17 id. 44; Civ. Code, § 3,369; *Groat* v. *Gillespie*, 25 Wend. 383; Sedg. Dam. § 47; *Ashby* v. *White*, Lord Raymond R. 938; Smith's L. C. 342.)

Byron Waters, for Respondent:

Cited High on Injunctions, §§ 973–4.

Ross, J.:

This is an action upon an injunction bond given in a suit brought by a certain Colony Association, as plaintiff, against these plaintiffs and others, as defendants, to recover damages for an alleged trespass upon certain lands, and praying also for the issuance of an injunction restraining the defendants from the commission of certain acts complained of. In that action the defendants were by an order of the Court enjoined from the commission of those acts. The injunction was finally dissolved, and the present plaintiffs sue to recover damages al-

leged by them to have been sustained by the wrongful issuance of the injunction.

After trial had, the Court below found that the plaintiffs sustained no damage by reason of the restraining order, except to the extent of the payment by them of attorney's fees in the action. The Court below also found that these fees were paid by each of the plaintiffs contributing a certain *pro rata* share out of his separate individual funds, and hence concluded that the plaintiffs had sustained no *joint* damage, and for that reason could not recover anything in this action.

It will not be necessary for us to say whether or not we agree with the lower Court in its view upon the question, since it is also found as a fact that the fees paid the attorneys in the case were paid under an agreement providing for the payment of a gross sum for services rendered in the entire litigation, both in the District and Supreme Courts, and upon the merits of the whole controversy. No distinct charges were made for services in procuring the dissolution of the restraining order, and no attempt was made to show what such services were worth.

We understand the law to be as stated by Mr. High in his work on Injunctions: "A reasonable amount of compensation paid as counsel fees in procuring the dissolution of an injunction may be recovered in an action upon the bond, if the injunction was improperly or wrongfully issued, *the amount being limited to fees paid counsel for procuring the dissolution, and not for defending the entire case.*" (High on Injunctions, §§ 973–4, and cases there cited.)

At the argument of this cause, it was contended by counsel that the plaintiffs were at least entitled to nominal damages. If, notwithstanding the finding referred to, counsel are correct in this position, we think we are justified in invoking the maxim "*De minimis non curat lex.*" (*Willson* v. *McElroy*, 25 Cal. 174; *McConihe* v. *N. Y. & E. R. R. Co.* 20 N. Y. 495; *Jennings* v. *Loring*, 5 Ind. 250.)

The judgment and order are affirmed.

MORRISON, C. J., SHARPSTEIN, J., and MCKINSTRY, J., concurred.

[No. 6,736.—Department No. 1.]

HELLMAN *v.* LEVY AND ARPIN.

NOTICE—CONSTRUCTIVE NOTICE—POSSESSION.—One that takes a mortgage upon land, in the sole and exclusive possession of another, can disprove notice of that other's claim only by showing that he made every proper inquiry in respect to the rights of the possessor, and failed to obtain information; but to have such an effect it must appear that the possession is open and notorious.

APPEAL, by defendant Arpin, from a judgment for the plaintiff, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

Action for the foreclosure of a mortgage executed by the defendant Jacques Levy to the plaintiff, July 11th, 1876 (duly recorded). The defendant Arpin alleges in effect, in his answer, that on the 13th day of June, 1876, he (then being the owner) conveyed the premises described in the mortgage to one Simon Levy, by a deed absolute on its face, but intended only as a mortgage, and that at the same time Simon Levy executed to him a written defeasance to reconvey upon the repayment of money, which Levy agreed to pay, for costs and attorneys' fees, in an action then pending against Arpin, but which, in fact, he never paid; that Simon Levy afterward conveyed the land by a quitclaim deed to the defendant Jacques Levy, who took with full notice of Arpin's rights; and that the plaintiff also took his mortgage with full notice of all the facts above stated; that on the said 13th day of June, he (Arpin) was, and ever since has been, and still is, the owner, in open, notorious, and exclusive possession of said land, residing thereon, and cultivating the same, and every part thereof.

The Court in effect found the facts to be as stated in the answer, except as to the possession of Arpin, and notice to the plaintiff; and, on the former point, found as stated in the opinion, and on the latter, as follows:

"*Seventh.*—That at the time the plaintiff received the note and mortgage referred to from the defendant Levy, he did not know that Arpin was in possession of the land, nor did he have any knowledge whatever that Arpin claimed any interest in said land; that he did not know of the existence of the agree-

ment referred to, nor did he have actual notice of any circumstances sufficient to put him upon inquiry as to Arpin's claim."

The defeasance referred to in the answer was not recorded.

The other facts are stated in the opinion.

Bicknell & White, and *J. S. Chapman*, for Appellant.

One who purchases or takes a mortgage of land in the open, notorious possession of another, without inquiry, is not a purchaser or incumbrancer in good faith. (*Partridge* v. *McKinney*, 10 Cal. 181, 185; *Lestrade* v. *Barth*, 19 id. 660; *Landers* v. *Bolton*, 26 id. 418; *Pell* v. *McElroy*, 36 id. 271–3.) It makes no difference that he did not know of the possession. (*Pell* v. *McElroy*, cited *supra*.) Arpin claims adversely to Hellman's mortgage, and therefore his rights cannot be determined in this action. (*San Francisco* v. *Lawton*, 18 Cal. 465; S. C. 21 id. 589; *Burton* v. *Lies*, id. 87; *Elias* v. *Verdugo*, 27 id. 418; *Croglan* v. *Spence*, 53 id. 15.)

A. H. Judson, for Respondent.

Possession has never been held to be constructive notice, unless such possession was open, notorious, and exclusive, such as inclosure, cultivation, etc. (3 Wash. R. P. 284); nor is it notice unless the fact of such possession is known to the purchaser or incumbrancer. This we claim has always been the rule; but under the Code there can be no doubt of it. (Story's Eq. Jur. § 400; 5 Johns. Ch. 29; Civ. Code, § 19; *Jones* v. *Smith*, 1 Hare, 43.)

MCKINSTRY, J.:

It may be admitted that one who takes a mortgage of land in the sole and exclusive occupation of another than the mortgagee, can disprove notice of that other's claim only by showing that he made every proper inquiry in respect to the rights of the possessor and failed to obtain information. That such should be the effect of a possession, however, it must appear that the possession is open, visible, exclusive, and unambiguous. (3

Washburn on R. P. 284.) *Open* and *notorious* possession is sufficient to put a purchaser on inquiry. (19 Cal. 676; 29 id. 490.) The *sixth* finding of the Court below is as follows:

"That the defendant, Arpin, had resided on the land in controversy for several years prior to his deed to Levy, and has continued to reside thereon ever since, having a house on said land, and having cultivated the same every year, but not having the same inclosed; that he is an unmarried man, living alone, and frequently goes to the city of Los Angeles, and it did not appear whether he was actually on the land at the time the mortgage was executed, or whether he was temporarily absent therefrom."

We are not authorized to say that a finding of these facts necessarily determines the defendant's open and notorious possession, or conclusively determines that plaintiff was put upon inquiry, as against the positive finding, (No. 7) that plaintiff, when he took and recorded his mortgage, had no notice of the claim of defendant, Arpin.

Judgment and order affirmed.

MORRISON, C. J., and MCKEE, J., concurred.

[No. 7,085.—Department No. 2.]

FLETCHER *v.* MOWER.

PATENT—VENDOR AND VENDEE—CONTRACT FOR SALE OF LAND—SPECIFIC PERFORMANCE—VENDOR'S LIEN—THE BOOTH BILL.—In an action by a vendor of land for a specific performance of the contract, and the enforcement of his lien: *Held*, that the decision of the cause must turn upon the question whether the plaintiff, when he tendered a conveyance of the land to the defendant, had a title thereto such as the parties contemplated at the time they entered into their contract; and *held further*—the question turning upon the validity of the patent discussed in the opinion, and under which the plaintiff deraigned title—that the patent was valid.

APPEAL from a judgment for the defendant, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The facts are stated in the opinion.

Bicknell & White, for Appellant.

The facts found, taken in connection with the act of Congress, entitled, "An Act relating to indemnity school selections in the State of California," approved March 1st, 1877, (U. S. Stat. 1876–7, p. 267) makes the title of the plaintiff to the land perfect.

S. F. Leib, and *J. W. Stump*, for Respondent.

The case does not come within the operation of the Booth bill. The whole object of that bill is to cure selections which were based upon school lands, which, at the date of the selection, *were within the exterior lines of a Mexican or Spanish grant*, but which were not *then* lost, because the grant had not been finally surveyed. There is no finding that such was the case in this instance, and the evidence must be presumed the other way, in support of the general finding of want of consideration.

SHARPSTEIN, J.:

In December, 1875, the plaintiff agreed in writing to convey to the defendant twenty acres of land for $1,000. Defendant paid $500 of the purchase price down, and executed a promissory note for the remaining $500, due eighteen months after its date. Whereupon the defendant took possession of the land.

After the note became due, the plaintiff brought suit on the note, tendered a deed according to agreement, and prayed for judgment against the defendant for the amount due on the note, and that the land be sold, and the proceeds applied in satisfaction of such judgment, etc. Prayer in usual form.

Defendant, by his answer, admits all these facts, but denies that the plaintiff had, at the time of the execution of the agreement, or has now, the legal title to the lands, and alleges that there is an entire failure of consideration for the agreement of defendant and the $500 paid; alleges that the land was public land, subject to the general land laws of the United States, and

that the defendant, being a qualified pre-emptor, entered and settled upon the S. ½ of the NW. ¼ and N. ½ of SW. ¼ of sec. 32, T. 2 S., R. 13 W., S. B. M., which includes the land in controversy, on the 12th day of March, 1876, claiming the same under the pre-emption laws of the United States; alleges the qualification of defendant as a pre-emptor, that he has tendered his filing, proof, and payment in the United States Land Office, etc.

Defendant also alleges that the land in controversy was, until 1871, within the claimed and exterior limits of a valid Mexican grant, and was not subject to selection by the State; that the title of plaintiff is by a patent from the State of California, which patent is alleged to be void.

Defendant also states that he tendered plaintiff the possession of the land, and offered to account for the rents and profits, and demanded a rescission of the contract; and upon these facts, defendant prays that the title of plaintiff be adjudged void, and that plaintiff be enjoined from asserting any title to the land; that the agreement between plaintiff and defendant be rescinded, and that defendant recover judgment for the money paid plaintiff, etc.

Trial was had; judgment rendered for defendant as prayed for; motion for a new trial was made and denied, and this appeal taken from the order denying the motion and from the judgment.

The Court found, among other things, that the approved township plat, including the land in question, was filed in the United States Land Office, April 22nd, 1868; that the land in question was selected by the State Locating Agent as lieu land, and was listed to the State in November, 1871, and that a patent issued from the State to one E. W. Squires; and the defendant in his answer alleges that the plaintiff's claim of title is deraigned through mesne conveyance from said Squires. In other words, it is conceded that the plaintiff, before and at the time of the making of his contract to convey said land to the defendant, had succeeded to whatever right or title Squires acquired by and through the patent issued to him by the State.

The land is conceded to be agricultural land, and it is admit-

ted that the defendant entered into possession under the agreement of the plaintiff to convey the land to the defendant.

This land is within a certain tract of land which was taken in lieu of the S. E. ¼ of section 36, T. 4 S., R. 4 W., San Bernardino meridian; and the Court found, "that at the time of making said application and selection," the land in lieu of which it was taken "was, and has been ever since, and is now, in place, and is the property of the State of California, and has never been under the claim of any confirmed and finally surveyed Mexican or Spanish grant."

The decision of this cause must turn upon the question whether the plaintiff, when he tendered a conveyance of the land to the defendant, had a title thereto, such as the parties contemplated, at the time of entering into their contract, that he should have and convey to the defendant. That he had a patent from the State is admitted. But it is insisted on behalf of defendant, that, owing to certain inherent vices by which it is infected, it is voidable. We do not think that there can be any doubt as to the patent having vested in Squires and his grantors all the right, title, and interest of the State in and to the land described in it. The Act of March 27th, 1872, (Stat. 1871–2, p. 587) vested any title which the State might have had before that time in him. The plaintiff tendered his deed to the defendant after the passage of what is known as the "Booth bill" (U. S. Stat. 1876–7, p. 267); and under the construction which has been given to that act of Congress by both the Secretary of the Interior and the Attorney-General of the United States, the land in dispute was public land at the date of the selection by the State, and it was entirely competent for the United States, as between it and the State, to grant it to the State. We are entirely satisfied with that construction; from which it follows that the conclusions at which the Court below arrived are erroneous.

Judgment reversed, with direction to the Superior Court of Los Angeles County to enter judgment upon the findings for the plaintiff, as prayed for in his complaint.

THORNTON, J., concurred.

I concur in the judgment, for the reason that the defendant does not show such a failure of consideration as will defeat plaintiff's right to recover. As to whether any title passed by the State patent, I express no opinion. MYRICK, J.

[No. 6,969.—Department No. 1.]

GILMORE *v.* THE LYCOMING FIRE INS. CO.

PLEADING—COMPLAINT.—Where a party relies in his complaint upon a contract in writing, and it affirmatively appears that all the terms of the contract are not set forth in *hæc verba*, nor stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient. So *held*, in an action upon a policy of fire insurance, where the policy, attached to the complaint as part thereof, referred to the application of the assured as forming a part of the policy and as a warranty on the part of the assured, but the application was not attached nor the effect alleged in the complaint.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The facts are stated in the opinion.

Gray & Haven, for Appellant.

Brunson & Wells, for Respondent (on petition for hearing in bank).

The point decided was not claimed or discussed by appellants in the Court below, or presented in their brief upon the submission of the case. We respectfully submit that the principle decided by the Department is not law. In alleging a deed at common law, the plaintiff need not in his pleading show more of it than answers his immediate purpose. (1 Chitty Pl. 430.) If the omitted part would show that the plaintiff had no cause of action, or that there was a material variance, the defendant could crave oyer. (Id. 434.) But we think there is no instance where a demurrer for insufficiency would be sustained, because it appeared that there was some matter which might, if shown, defeat the complaint. But we may admit the correct-

ness of the principle stated in the decision, with this qualification, that it must necessarily appear that some part of the contract has been omitted. The reference in the policy to the application does not necessarily show that there was in fact any such application ever made. Notwithstanding such reference, there may, in fact, be no such application, and, if there is a necessary legal conclusion that there is one, and it must be pleaded, the result would be that no action could be maintained on the policy at all, unless the application referred to actually existed. The practical effect would be, that a policy containing such a reference would be void. But it has been held to the contrary. (*Blake* v. *Exchange Mutual Ins. Co.* 12 Gray, 266.) We submit that it did not appear from the complaint that there was an application. The allegation is, that the copy attached to the complaint is a true copy, and the demurrer to the answer admits that it is. We submit that the allegation is a good averment—as against a general demurrer—that there was no application. (*Hill* v. *Hoskin*, 51 Cal. 177.)

MCKINSTRY, J.:

The demurrer to the complaint should have been sustained. Where a party relies upon a contract in writing, and it affirmatively appears that all the terms of the contract are not set forth in *hæc verba*, nor stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient. Here the plaintiff alleges that, for sufficient consideration, the parties entered into a contract of insurance, a copy whereof is annexed as part of the complaint. The policy contains the provision following:

"Sum insured, $550. Time, one year. Rate, 3.50 per cent. Premium, $22.75.

"And the said Lycoming Fire Insurance Company hereby agree to make good unto the said assured, her executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire or lightning to the property so specified, from the 24th day of June, 1878, at twelve o'clock, at noon; the amount of loss or damage to be estimated

according to the actual cash value of the property at the time of the loss, and to be paid ninety days after due notice and proofs of the same shall have been made by the assured and received at this office, in accordance with the terms and provisions of this policy, unless the property be replaced, or the company shall have given notice of their intention to build or repair the damaged premises. *Reference being had to the application of the assured, which forms a part of this policy*, and is a warranty on the part of the assured.

"1. If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of the contract, and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or overvaluation, or any misrepresentation whatever, *either in a written application* or otherwise; or if the assured shall have, or shall hereafter make, any other insurance of the property hereby insured, or any part thereof, without the consent of the company written hereon, or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant and unoccupied more than thirty days, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever, without the assent of this company indorsed hereon," etc.

The application of the assured is not set forth in the complaint, nor are its contents alleged. Yet, as we have seen, the application "forms a part" of the policy. The plaintiff avers that she has "duly performed all the conditions" of the contract on her part, but the averment fails to make the complaint complete in the absence of a portion of the policy which is necessary to explain the agreement as a whole, and which in connection with the policy proper may determine what the conditions are. (See *Bobbitt* v. *L. & L. & Globe Ins. Co.* 66 N. C. 70.)

Judgment and order reversed, and cause remanded to the Court below, with direction to sustain the demurrer to plaintiff's complaint, with leave to amend.

SHARPSTEIN, J., and MCKEE, J., concurred.

[No. 6,567.—Department No. 1.]

LUCAS v. PICO.

PROMISSORY NOTE — CONSIDERATION — BARRATRY. — Information of an outstanding title to land, in the adverse possession of another, constitutes a good consideration for a promissory note, and the sale of such information is not barratrous.

NON-NEGOTIABLE CONTRACT — ASSIGNMENT. — A non-negotiable contract, indorsed in blank, passes by delivery, and the holder may, after the bringing suit, fill up the indorsement with a special assignment to himself.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The facts are stated in the opinion.

Glassell, Smith & Smith, for Appellant.

The consideration of the alleged instrument was barratrous. The information given was false, and utterly valueless. It was shown that Briswalters' title was good, independently of the Statute of Limitations; and that the controversy excited was groundless. (4 Black. C. (134) 96; Jacobs' L. D. title "Barrator"; Pen. Code, §§ 158–9; 1 Parsons' Cont. 456; 2 id. 746; Broom's Leg. Max. (573).)

The plaintiff was not the owner of the instrument sued upon. A non-negotiable instrument can be assigned *only by indorsement in writing*. (Civ. Code, § 1459.) This does not imply that it may pass by delivery merely.

Bicknell & White, for Respondent.

A non-negotiable instrument may be transferred by indorsement. (Civ. Code, § 1459.) No fraud was practiced upon the defendant. He paid for a doubtful title, and this is a sufficient consideration. (*Russell v. Cook*, 3 Hill, 505; *Reese v. Gordon*, 19 Cal. 149.)

McKEE, J.:

On the trial of this case, the defendant in the Court below objected to the offer of the promissory note in evidence, because

it appeared from the testimony that the consideration of the note was contrary to public policy and morality, and specially that it was barratrous; and because it also appeared that the note itself had not been assigned to the plaintiff before the commencement of the action; and as the plaintiff was not the legal owner thereof, he could not maintain the action. The defendant also moved for a nonsuit upon, substantially, the same grounds. Both his objections and motion were overruled by the Court, and he brings the case here on appeal for review.

The note which forms the subject-matter of controversy in the case is in the following words and figures:

"$800. LOS ANGELES, Oct. 22, 1877.

"At eight months from this date I promise to pay to F. P. Johnson, in person, for understood value, the sum of eight hundred dollars, in gold coin of the United States of America.

PIO PICO."

This note was given under the following circumstances: Juan de Toro, a searcher of records, while examining the records of deeds in the Recorder's office in Los Angeles County, discovered that two patents had been granted to the City of Los Angeles for city lands, and that there was a person in the adverse possession of a tract of those lands, the title to which, under one of the patents, was outstanding in another. On ascertaining this condition of the title, Toro associated with him one Johnson for the purpose of buying the outstanding title on speculation. To this end Johnson, in behalf of himself and Toro, communicated his information to the defendant. Defendant took counsel upon it, and, upon the legal advice which he received, he concluded to buy the outstanding title. For that purpose he agreed with Johnson to pay $2,000 for it, if the latter would obtain for him a deed from the owner. Johnson procured the deed, and when it was delivered to the defendant, the latter paid the purchase-money, and, at the same time, made and delivered to Johnson the note in controversy, and also made and delivered one of like import to Toro, for the information which they had given, and the services which they had rendered in procuring the title.

We see nothing in the transaction which violates good morals. It is not an immoral act to give information about an out-

standing title to a tract of land, which is in the adverse possession of another, or to render services in the acquisition of such a title. Nor is there anything in such a transaction which would be likely to prove prejudicial to the morals of the community. The law does not prohibit the purchase of such a title; and any lawful act which has for its object the accomplishment of such a purpose cannot be considered as against public policy or the policy of the law. An act which does not violate any rules or principles of law, and is not evasive of anything which is established by law, or which the law aims to promote, is not against public policy or the policy of the law.

Nor is the transaction barratrous. Barratry is made an indictable offense, both by common law and the Penal Code of the State. By the latter it is defined to be the practice of exciting groundless judicial proceedings. But no person can be convicted of such an offense, except upon proof that he has excited suits or proceedings at law in at least three instances, and with a corrupt or malicious intent to vex and annoy. (Sec. 156, 159, Pol. Code.) Nothing in the transaction under consideration tends to show that any of the parties concerned in it have fomented or attempted to foment law-suits or quarrels about the property which was the subject of the purchase. They aided in purchasing an outstanding title to it, the validity of which depends upon the patent to the City of Los Angeles from which the title is deraignable. At common law such a purchase would have been considered void; and it would not have been a valid consideration for a promissory note or other contract, for that law prohibited the acquisition of a title to land from one who was not in the actual possession of the land. The maxim of the law as laid down by Lord Coke is, that nothing in action, entry or re-entry, can be granted, for the reason that under color thereof pretended titles might be granted to great men, whereby right might be trodden dow and the weak oppressed. (4 Kent's Commentaries, 447.) But that rule has never prevailed in this State. By the Civil Code of the State, any person claiming title to real estate in the adverse possession of another, may transfer it with the same effect as if in actual possession. (Sec. 1047 Civ. Code.) To participate in any capacity, whether as principal, or agent, or broker, in a

transaction for obtaining a transfer of title to land in that condition, is neither barratrous nor champertous. Being an act which is authorized by law, it is neither *malum in se* nor *malum prohibitum*. It is not indictable, nor subject to a penalty or forfeiture; and it follows that the consideration of the contract in controversy was not against good morals or public policy, or tainted with barratry.

And the contract itself, though non-negotiable, was indorsable; for a non-negotiable contract is, by law, assignable by indorsement in like manner with negotiable instruments, subject, of course, to all equities and defenses existing in favor of the maker at the time of the indorsement. (Sec. 368 Code Civ. Proc., and § 1459 Civ. Code.) It is that which constitutes the principal difference between negotiable and non-negotiable contracts.

After the payee had specially indorsed the contract in this case and delivered it to his assignee, and the latter qualifiedly indorsed it, and delivered it to one Higgins, who sold and delivered it to the plaintiff, any subsequent holder from Higgins might take the same by mere delivery, and make himself the assignee of the last assignor by filling up the indorsement in his own name. But whether this was done or not, the holder was the proper party to sue; for the holder of a non-negotiable contract is presumptively the owner, and, as the real party in interest, he is entitled to maintain an action upon it in his own name. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by law. (Sec. 367 Code Civ. Proc.) When, therefore, the Court permitted the plaintiff at the trial to fill up the indorsement on the contract to himself, we think there was no error which prejudiced the defendant. (*Poorman* v. *Mills & Co.* 35 Cal. 118.)

Judgment and order affirmed.

McKINSTRY, J., concurred.

ROSS, J., concurred in the judgment.

[No. 6,472. Department No. 2.]

CARRILLO, GUARDIAN, ETC., *v.* MCPHILLIPS.

GUARDIAN—TRUST FUND—TRUSTEE—PROMISSORY NOTE—ACTION FOR PERSONAL PROPERTY.—A promissory note was made to G. "or order, for the benefit" of certain minors, and was by him indorsed and delivered to the plaintiff, (the mother of the minors) and by her indorsed and delivered to the defendant, as a pledge to secure a debt of her own. Afterward the plaintiff was appointed guardian of the minors, and brought this action to recover the note or its value. *Held*, that the plaintiff, as guardian of the beneficiaries, was entitled to the possession of the note, and could maintain the action.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The facts are stated in the opinion.

Brunson & Wells, for Appellant.

If Garcia ever was trustee of the fund, he is so still, and he alone is entitled to the trust property, and not the guardian.

Howard, Brousseau & Howard, and *Bicknell & White*, for Respondent.

The instrument in controversy is the property of the minors, of whom the plaintiff is the guardian. Upon her qualification as guardian, it became her duty to take into her possession this note, as well as all other property of their estate. (Civ. Code, § 249; Code Civ. Proc. §§ 1753, 1754; Perry on Trusts, §§ 831, 835, 837; *Cook* v. *Tullis*, 18 Wall. 341; *Kitchen* v. *Bedford*, 13 id. 413; *Shaw* v. *Spencer*, 100 Mass. 382; *Corbitt* v. *Heisey*, 15 Iowa, 296.

SHARPSTEIN, J.:

On the 6th of August, 1874, O. W. Childs and five other persons made their promissory notes in writing, by which they promised: "On or before the day of the date of the minor children of John Rains, deceased, becoming of age, to pay to Joseph S. Garcia, or order, for the benefit of said children, the sum of $10,000, United States gold coin, with interest from the

1st day of September, 1874, until paid, at the rate of ten per cent. per annum, payable only every three months." Garcia afterward, in the same year, indorsed, transferred, and delivered said note to the plaintiff, and she afterward, on the 17th day of April, 1877, indorsed and delivered said note to the defendant herein as collateral security for the payment of a note of her own, made and delivered to the defendant on the same day. On the 17th day of April, 1878, the plaintiff was duly appointed guardian of the children of said John Rains, deceased, and after her said appointment, and before the commencement of this action, she demanded of the defendant and he refused to deliver to her the possession of said note.

The Court found that she was entitled to the possession of it, and rendered judgment accordingly. From that judgment and an order of the Court denying the defendant's motion for a new trial, this appeal was taken.

That Garcia violated his trust we have no doubt, and it was optional with the beneficiaries to look to him for the value of the property, or to follow it into the hands of any person who took it with notice of the trust. As it appears on the face of the note that he held it only as a trustee, no one could take it in ignorance of the trust. As the beneficiaries are infants and have a guardian, we think that the latter can maintain any action now for the recovery of the note that the beneficiaries, if of age, could.

Judgment affirmed.

THORNTON, J., and MYRICK, J., concurred.

[No. 6,527.—Department No. 1.]

HARPER ET AL. *v.* ROWE ET AL.

TAX SALE—CONSTRUCTION OF STATUTE.—Under a judgment in a tax suit, in favor of the People against an undivided interest, equal to 55,344 acres, in certain real estate, the Sheriff sold an undivided interest, equal to 5,000 acres, for the amount of the judgment and costs—including in the latter fifty cents for filing with the Recorder a duplicate certificate of sale—the interest sold being the smallest undivided interest that any purchaser would take and pay the amount demanded. In an action to quiet title, brought by the original owner of the land against defendants holding under the sale: *Held*, 1st, that the provision of § 8 of the Act of May 12th, 1862, (Hitt. art. 6479) that no more of the property should be sold than was necessary to pay the judgment and *costs*, authorized the Sheriff to include the *accruing* costs in the amount for which the sale was made, and that the fifty cents for filing the duplicate certificate of sale was rightly charged; and 2nd, that the property assessed and directed to be sold, being an undivided interest, a specific tract could not be sold, and the Sheriff was therefore authorized to sell an undivided interest. *Held, further*, objection being made to certain recitals in the sheriff's deed, that, as the statute did not provide for the form of the deed in such cases, the objectionable matter was mere surplusage, and did not affect the validity of the deed.

APPEAL from a judgment for the defendants, and from an order denying a new trial, in the Eighteenth District Court, County of San Diego. SEPULVEDA, J.

The complaint alleges that the defendants claim an interest in the land in controversy, by virtue of a tax deed based upon the levy for the year 1873–4, and a certificate of purchase based upon the levy of 1875–6. The defendants admit this allegation, and (excepting certain deeds from the heirs of the original owner) claim no other title. A judgment entered for the defendants was reversed by the late Supreme Court, (see report of the case, 53 Cal. 233) and the case having been remanded, the judgment now appealed from was entered. The Court found and adjudged that the tax deed and certificate referred to in the pleadings were void; but further found the judgment and sale referred to in the opinion, for the taxes of the fiscal year ending April, 1872, and adjudged that, under the same, the defendant Rowe was the owner of an undivided 5,000 acres of the land in controversy. The other facts are stated in the opinion.

Edward F. Head, and *McConnell*, for Appellants.

The sale was void, because made for a sum in excess of that allowed by law, namely, the sum of fifty cents for filing a duplicate certificate of sale. (*O'Grady* v. *Bernhisel*, 23 Cal. 287; *Treadwell* v. *Patterson*, 51 id. 637.) By the provisions of § 8 of the Act of May 12th, 1862, (Hitt. art. 6479) the Sheriff was authorized to sell "no more of the property than was necessary to pay the judgment and costs." As respects jurisdictional questions, an assessment does not invoke the same order of presumptions to sustain it, as the law invokes in support of judgments. But, granted a valid judgment and a valid assessment, the same principles apply to the sale. The Tax Collector had no authority to sell an undivided interest for the non-payment. (*Roberts* v. *Chan Tin Pen*, 23 Cal. 259.)

Chase & Leach, for Respondents.

The item of fifty cents was rightly charged as part of the *accruing* costs. (Prac. Act, § 229, Amdt. 1863; Hitt. arts. 5168, 6494; Acts 1869–70, p. 152.)

Peachy & Galan, for Appellant (petition for rehearing).

The claim upon which the judgment is based is not to be found in the pleadings, and the finding of the District Court with regard to it was outside the issues. (*Hentsch* v. *Porter*, 10 Cal. 559; *Garner* v. *Marshall*, 9 id. 269; *Hicks* v. *Murray*, 43 id. 521, 522; *Collins* v. *Bartlett*, 44 id. 381; *Kreichbaum* v. *Melton*, 49 id. 55; *Stoddart* v. *Burge*, 53 id. 398.)

The Sheriff's deed on sale for taxes of 1871–2 was duly objected to on the proper grounds.

Ross, J.:

On the 20th of May, 1873, the People of California recovered a judgment in the Eighteenth District Court against Doe et al. and certain real estate situated in San Diego County, for the sum of $729.60, for State and county taxes levied against the said real estate for the fiscal year ending April, 1872, and for the sum of $124.83 for attorney's fees in said action, and for the

further sum of $48.33 costs of suit. By the judgment it was also decreed that so much of the real estate as should be "sufficient to raise said taxes and attorney's fees and costs, and all accruing costs herein, and the costs and expenses of the sale," be sold at public action by or under the direction of the Sheriff of the County of San Diego, etc. Under this decree the Sheriff sold the property in question, being a portion of the property assessed, at public auction for the sum of $999.52, said amount being the sum total of the taxes, attorney's fees, and costs, as fixed in the decree, together with the costs incident to the sale, in which latter was included the sum of fifty cents for filing the duplicate certificate of sale with the County Recorder. The validity of the judgment under which the sale was made was conceded at the argument, but it was claimed by the appellant that the last item mentioned, namely, the fifty cents for filing the duplicate certificate of sale, was an illegal charge, and that therefore the property was sold for a sum in excess of that authorized by law, and that consequently the sale was void.

It may be conceded, for the purposes of this case, that if the item objected to was an illegal charge, the conclusion contended for by the appellant would be correct.

But was it unauthorized by law? By § 8 of the Act of May, 1862, (Hitt. art. 6479) which was in force at the time these proceedings were had, it was provided, that "in hearing and determining an action for the enforcement of a lien for taxes, the Court in which it is pending shall have and exercise all the powers that pertain to Courts of Equity in foreclosure of mortgages and liens; but when the decree of the Court contains no special directions as to the mode of selling, no more of the property shall be sold than is necessary to pay the judgment and costs, nor shall the property be sold for less than the amount of judgment and costs."

It is claimed by the appellant that the "costs" here referred to do not include *accruing* costs, but only such as are ascertained and fixed in the judgment. It is a sufficient answer to this to say, that the judgment, which is admittedly valid, in terms directs so much of the property to be sold as shall be necessary to satisfy the taxes, costs, *and accruing costs.*

But, independent of this, we think the words used in the

statute itself include *all* costs legitimately incurred in enforcing the collection of the tax. If this be not so, then the sheriff's commissions and other costs, such as advertising, etc., are illegal charges, and the sale was void, because these items were included in the amount for which the property was sold. Yet, appellant makes no objections to any of these, and virtually concedes their correctness. But they can only be sustained on the ground that they constitute a part of the *accruing* costs. And so it is in respect to the charge for filing a duplicate of the certificate of sale. The law in force at the time the sale was made (Hitt. arts. 5169 and 6194,) required the Sheriff to file a duplicate of such certificate in the office of the Recorder of the county, and the fee bill applicable to San Diego County at the time (Stat. 1869–70, p. 152) authorized the Recorder to charge and receive the sum of fifty cents for filing such duplicate. The item objected to was, therefore, authorized by law, and properly included in the accruing costs.

It is also objected, on the part of the appellant, that the sale was void, because the Sheriff sold an undivided interest in the land, instead of a specific tract. But the findings show that it was an undivided interest that was assessed, and the judgment under which the sale was made, as well as the statute in force at the time, (Hitt. art. 6194) directed that the Sheriff, in making the sale, should "only sell the smallest quantity that any person would take, and pay the judgment and all costs." The property assessed and directed to be sold being an undivided interest, it is manifest that no specific tract could be sold. The Sheriff was directed and authorized to sell only the smallest quantity of the undivided interest assessed that any purchaser would take and pay the judgment and all the costs. This he did.

Objections are also made to certain recitals in the sheriff's deed, but as the statute did not provide for the form of the deed in such cases, the objectionable matter is mere surplusage, and in no way affects the validity of the deed.

Judgment and order affirmed.

McKINSTRY, J., and McKEE, J., concurred.

[No. 6,552.—Department No. 2.]

AMES *v.* ELDRED ET AL.

DECLARATION OF HOMESTEAD—CONSTRUCTION OF STATUTE.—Under § 1263 Civil Code, a declaration *must* contain an estimate of the actual cash value. So *held*, with reference to a declaration of homestead that stated that the actual cash value was $5,000 and over.

APPEAL from a judgment for the plaintiff, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The facts are stated in the opinion.

Thom & Ross, and *C. N. Wilson*, for Appellants.

The declaration of homestead contains no estimate of the actual cash value of the land, as required by § 1263 Civil Code.

James H. Blanchard, and *Will. D. Gould*, for Respondent:

Cited Civil Code, §§ 1263, 1245, 1255; Estate of Delaney, 37 Cal. 182; *Myers* v. *Ford*, 22 Wis. 139.

MYRICK, J.:

The only question in this case is, as to the sufficiency of the declaration of homestead. Referring to the valuation of the premises, the declaration states "that the actual cash value is $5,000 *and over*." Section 1263 Civil Code provides that the declaration *must* contain an estimate of the actual cash value.

To say that a piece of property is of the value of $5,000 and over, is not to give an estimate of the actual cash value: it is not to say whether the property is worth $5,000 or $50,000. (*Ashley* v. *Olmstead*, 54 Cal. 616.)

Judgment reversed and cause remanded, with directions to sustain the demurrer to the complaint.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 6,487.—Department No. 2.]

GUARDIANSHIP OF CARDWELL.

GUARDIAN AND WARD—INVESTMENT.—A guardian may invest moneys of his ward without an order of Court; but, if he do, it may generally be said that he does it at his own risk. An order for investment obtained from the Probate Court, under § 1792 of the Code of Civil Procedure, would protect him even if misfortune were to follow; but, where he acts upon his own judgment, he is held to a more strict accountability.

ID.—ACCOUNTING—ESTOPPEL.—The settlement of a guardian's annual account is only *prima facie* evidence of its correctness. Section 1738 of the Code of Civil Procedure, as to the conclusiveness of administrators' accounts, is not made applicable to guardian's accounts by § 1789 of the Code of Civil Procedure.

ID.—INTEREST.—Where a guardian acts in good faith, and does not make any use or profit for himself of the funds, he is chargeable with the statutory rate of interest only.

APPEAL from an order settling the final account of a guardian, in the Probate Court of Los Angeles County. STEPHENS, J.

The facts are stated in the opinion.

Bicknell & White, for Appellant.

The guardian had power to invest moneys of his ward without an order of Court, (Code Civ. Proc. § 1780) and it was his duty to do so. (Perry on Trusts, § 452.)

The decree entered in the Probate Court, April 19th, 1876, allowing said guardian's account previously rendered, is conclusive upon this respondent. (Code Civ. Proc. §§ 1789, 1637.) The Probate Court had the power to approve the investment, and, by the settlement of the account, did so. (Code Civ. Proc. §§ 97, 98, 1792.)

The Court erred in allowing the respondent interest at one per cent. per month. It is conceded that the appellant acted in good faith. (*Estate of Holbert*, 48 Cal. 630; *Knight* v. *Earl of Plymouth*, 3 Atk. 480; *Thompson* v. *Brown*, 4 Johns. Ch. 628; *Rowth* v. *Howell*, 3 Ves. 565; *Estate of McQueen*, 44 Cal. 584; *Rapalje* v. *Hall*, 1 Sand. Ch. 399; *McNair* v. *Ragland*, 1 Dev. Eq. 520; *Sparhawk* v. *Buell's Administrator*, 9 Vt. 42; *Estate of Gasq*, 42 Cal. 288; *Estate of*

Stott, filed Oct. 27th, 1877; *Estate of Clarke*, filed March 10th, 1879.)

Chapman & Graves, and *Thom & Stephens*, for Respondent.

The guardian had no right to make the purchases, and the ward may require of him her money, with interest. (Schouler's Dom. Rel. 461, 466, 469; *De la Montagnie* v. *Union Ins. Co.* 42 Cal. 291; *Kendall* v. *Miller*, 9 id. 591.)

The decree allowing the guardian's account was not conclusive. (Code Civ. Proc. §§ 1637, 1789, 1774; 7 Paige, 46; Civ. Code, 250, 256–7; *Allen* v. *Tiffany*, 53 Cal. 16; Schouler's Dom. Rel. 468.) The appellant was properly charged with interest. (*Estate of Holbert*, 48 Cal, 627; *Estate of Gasq*, 42 id. 288.)

MYRICK, J.:

This is an appeal by the guardian from an order of the Probate Court settling his final account, disallowing certain items which he sought to have placed to his credit, and charging him with interest on certain sums. The facts are stated in the findings, from which we gather the following:

On the 11th of October, 1866, the guardian was appointed, and he remained such until his ward attained majority, September, 1877. From time to time during the guardianship he received various sums of money and certain real estate, the property of his ward. January 8th, 1875, he had $5,000 in his hands belonging to the ward. On that day, one Pleasants was desirous of purchasing from one Ramirez a tract of land known as the Ramirez place, and applied to the guardian for a loan of $5,000 to make the purchase. Pleasants made the purchase, and the guardian on the said day loaned to him the $5,000 belonging to the ward, taking the promissory note of Pleasants. As security for the loan, the guardian, on the 1st of February, 1875, took in his own name, with the consent of Pleasants, a deed of the land from Ramirez, the understanding being that when Pleasants should pay the amount so loaned with interest, he was to have a conveyance of the land. The land was at that time worth only $5,000. Shortly afterward

Pleasants agreed to sell to Reavis one-third interest in said land, and the guardian agreed that upon payment of said sum of $5,000 and interest he would convey the land, two-thirds to Pleasants and one-third to Reavis. January 20th, 1877, there was due on the note, $5,000 principal and $762.50 interest; on which day the guardian, in payment of said sums, took from said Pleasants, (who was then insolvent) and from Reavis, in his individual name, a deed of all their right, title, and interest in the Ramirez place, and from Reavis a deed of lot 3, block 27, lot 16, block 22, and lots 3 and 4, block 25, East Los Angeles, and canceled and surrendered the note to Pleasants. The Ramirez place and the East Los Angeles lots the guardian, in rendering his final account, proposed to surrender and turn over to said Leonora in lieu of the aforesaid money. The guardian never had any authority from the Probate Court to make the loan or purchase the property, or to surrender the note, or to make any of said transactions.

On the 3rd of March, 1872, said guardian had the other sum of $1,500 belonging to his said ward, and $1,500 belonging to a brother of Leonora's, also under the same guardianship, and loaned both sums to one Beane, taking his promissory note therefor, with interest at the rate of 1¼ per cent. per month, secured by mortgage on one-half of a lot on Commercial Street, in Los Angeles, (said one-half being then worth $1,600) and a chattel mortgage of a half interest in a printing establishment, (said half interest being then worth $1,000.) On the 12th of December, 1872, there was due on the note from Beane, for principal $3,000, and for interest $337.50; and Beane being insolvent, the guardian took from him a conveyance of the real estate and personal property mortgaged, and canceled and surrendered the note. The interest thus acquired in said lot the guardian proposed to have turned over to said Leonora in lieu of the said $1,500. The guardian had no authorization from the Probate Court to make any of these transactions.

The guardian made some other loans and took notes therefor, which notes, it was stipulated on the trial, the guardian would retain and be charged with the amounts thereof.

The said loans and all of said transactions were made, received, and had in good faith on the part of the guardian; the

conveyances to him were received on the advice of counsel; and the guardian had no intent to acquire any title or advantage to himself. The loans, however, were made (as the Court found) upon inadequate security, and were not such as a prudent business man would have made. At all times since February, 1872, the guardian could have loaned the money on good security upon interest at the rate of one per cent. per month. At various times since the purchases, the guardian received rents, from the Ramirez property $93, and from the Beane lot $385, and sold the printing establishment for $1,617.50, which items he has charged to himself; and has paid $288.56 taxes on said real estate, which he has placed to his credit. He has tendered to said Leonora a proper deed of said real estate. On the other hand, said Leonora offered a deed to the guardian of the real estate.

On the 10th of February, 1876, the guardian rendered a full account and report of his proceedings, including the transactions above referred to which were then completed, viz., the loan to Beane and the deed from him, charging the ward therewith, and the loan to Pleasants. After due notice and a full hearing, April 19th, 1876, the account was settled and allowed as rendered, and a decree made to that effect, which has never been reversed, modified, or set aside, nor has any motion been made to that end.

The findings also embrace transactions not involved in the questions on this appeal.

On these findings, the conclusions of law at which the Court arrived were, in substance:

That the loans to Pleasants and Beane were made on inadequate security and improvidently; that the purchases were without authority, and not binding on said Leonora; that the guardian should be charged with said sums of $5,000 and $1,500, with interest thereon at the rate of one per cent. per month; that the sums of $478 rents, and $1,617.50 received on sale of the printing establishment, should be eliminated from the account; that he should be charged with $288.56, amount paid for taxes on said real estate, and that judgment should be rendered accordingly.

A decree was made to that end, and from that decree the guardian has appealed. The points made on the appeal are:

1. The guardian had power to invest moneys of his ward without an order of Court.

2. The decree of the Probate Court of April 19th, 1876, settling and allowing the guardian's account, is conclusive upon the respondent.

3. The Court erred in allowing the respondent interest at one per cent. per month on the moneys loaned to Beane and Pleasants.

First.—It is true that a guardian has power to invest moneys of his ward without an order of Court. But if he do so, it may generally be said that he does it at his own risk. The statute is, that he "must manage the estate of his ward frugally and without waste." The Court found that the loans were, in the first instance, made upon inadequate security. That cannot be said to be frugal management. If an opportunity for investment present itself to a guardian, the statute is plain and direct as to the mode by which he will be protected, viz., § 1792 Code of Civil Procedure, by which the Probate Court, on application by the guardian or any other person interested, may authorize and require the guardian to invest the ward's money in real estate or any other manner beneficial, and may give such directions as may be needful for the management, investment, and disposition of the estate. An order for investment or other management, thus obtained, would protect the guardian, even if misfortune were to follow; but where he acts upon his own judgment, he is held to a more strict accountability. This rule may at first seem harsh, but a knowledge of the reasons for it will at once exhibit its correctness. The ward has no voice; the moneys *belong* to her, but she cannot be authoritatively heard; the Court, the especial protector of wards, is not consulted; the guardian, in this case honestly, but imprudently, loans upon inadequate security; the property being money, which could be readily loaned at interest on good security, is loaned in such a way that but one result would naturally follow, viz., the taking of real estate not worth its price.

Second.—It naturally follows that where there has been no order for investment or loan, the settlement of the account ren-

dered subsequent to the transaction is not conclusive upon the right of respondent to question the propriety of the guardian's acts.

Section 1789 Code of Civil Procedure, provides that all the *proceedings* as to accounting, and the settlement of accounts of guardians, must be had and made as required concerning estates of deceased persons; but this does not make § 1738 Code of Civil Procedure, as to the *conclusiveness* of the settlement of administrators' accounts, applicable to guardians' accounts. The Code does not in terms provide that the settlement of a guardian's intermediate account shall be conclusive. It may, therefore, be said to be merely *prima facie* evidence of its correctness, subject to be inquired into.

The effect of the decree appealed from is, to let the guardian keep the real estate which he purchased, and account to the ward for her money. If the real estate can be made to yield the proper amount, he is secure; if it fail to do so, he receives the result of his own judgment as to the wisdom of the transaction, which is not only legal but moral justice.

Third.—The Court found that the guardian could have loaned the money at one per cent. per month, and so charged him with that rate of interest. If he had loaned it at the statutory rate, he would have been justified. He had the right to determine for himself whether he would loan at the latter rate, or take the risk of loaning at the increased rate. Where a guardian *acts in good faith*, does not make any use for himself of the funds, and makes no profit to himself, the law does not fix a penalty in the nature of "smart money," but charges him with the statutory rate of interest only. The Court erred in fixing the rate of interest higher than that. It does not appear that the property purchased has yielded or will yield any profit, or that it will repay the principal.

The cause is remanded to the Superior Court of Los Angeles County, with instructions to remodel the settlement of the account by computing interest at the statutory rates, compounding annually, and in all other respects the order should be affirmed. So ordered.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 6,953.—Department No. 2.]

PHENIX MILL AND MINING CO. *v.* LAWRENCE ET AL.

UNLAWFUL ENTRY—POSSESSION—COLOR OF RIGHT.—Actual possession is *prima facie* evidence of title in the possessor, and is protected by the law against lawless invasion without right or color of right. An entry upon such possession cannot be made in good faith, unless it is made upon some right, or color of right, or claim of legal right, to make the entry; and such claim of right must exist before the entry to constitute good faith.

ID.—ID.—ID.—INSTRUCTIONS.—In an action for unlawful entry, (under § 1160 Code Civ. Proc.) it appeared that the defendants entered upon the mining claim of the plaintiff, under the claim that the plaintiff's location was void, and with the purpose of themselves locating it; and the Court instructed the jury that if the defendants entered peaceably and in good faith, under claim, or color of title, or in good faith believing themselves to be the true owners, they were entitled to a verdict; but that a party cannot enter for the purpose of obtaining title or color of right, but must have it before he entered; and refused to instruct the jury, at the instance of the defendant, that if the defendants entered upon the mines peaceably and in good faith, believing that they were open to location, then the entry was not unlawful. *Held*, that there was no error.

ID.—EVIDENCE—GENERAL BELIEF.—*Held further*, that the Court properly ruled out the following question: "Do you know what the *general belief* was with reference to those mines; as to whether they were abandoned or not?"

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the County Court of San Bernardino County. WILLIS, J.

The facts are stated in the opinion.

A. B. Hunt, for Appellants.

The general belief among the miners that the mines had been abandoned was a circumstance to be considered by the jury, as to the good faith of the entry of defendants. The question was not whether defendants had the title, but whether they believed in good faith they had a right to enter. (*Shelby* v. *Houston*, 38 Cal. 422.)

The Court erred in its instructions to the jury. The land was public mineral land of the United States, and the defendants, under the laws of the United States, had a perfect right to go upon and locate the same. The instructions entirely ignored any right that the defendants might have under the min-

ing laws of the United States. (U. S. Rev. Stat. § 2319; *Kile* v. *Tubbs*, 28 Cal. 404; *Tyler* v. *Green*, id. 409.)

The Court erred in refusing to give the instruction asked by the defendants. (*Janson* v. *Brooks*, 29 Cal. 221; *Townsend* v. *Little*, 45 id. 676.)

Byron Waters, and *H. M. Willis*, for Respondent.

The extent of the defendants' defense is, "that they entered in good faith, *believing they had a right to do so*." There is a broad distinction between *color of title, or color of right*, and *mere naked belief*. (*Shelby* v. *Houston*, 38 Cal. 417.)

A party cannot enter for the purpose of obtaining title, or color of title, or color of right. He must have it before he entered, as a basis upon which he can found his good faith in entering. (*Shelby* v. *Houston*, cited *supra*; *Atherton* v. *Fowler*, 96 U. S. 513; *Hosmer* v. *Wallace*, 97 id. 575; *Bradley* v. *Lee*, 38 Cal. 367.)

McKEE, J.:

The action was against the defendant for an alleged unlawful entry on the 13th of May, 1879, upon "those certain leads, lodes, and mining property known as Beatrice No. 1, and Beatrice No. 2, situated at Ivanpah, Clark Mining District, San Bernardino County," of which, it was claimed, the plaintiffs had had peaceable possession until the day of the unlawful entry thereon by the defendants, and for more than five days before; and after their entry thereon the defendants refused on demand to restore the possession thereof to the plaintiffs.

The possession of the plaintiffs, the entry of defendants, and demand and refusal, are specifically denied; but in a further answer the defendants admit that they entered, in good faith, upon the property on the 13th of May, 1879, believing that the ground was vacant, and subject to location, according to the laws of the United States, and of Clark Mining District.

As to the possession of the plaintiffs, demand and refusal, and the entry by the defendants, the evidence was all one way. The defendants themselves, in their testimony, admit that the company had been in possession of the property since 1878, and

that the company, and its predecessor, had expended in tunneling, timbering, and building railroad tracks, dumps, and houses, and in cars and tools, several hundreds of thousands of dollars —probably, says the defendant Lawrence, half a million of dollars. In 1879 the company ceased work upon the mine for a while, but, during the suspension of work, it kept men in general superintendence over the property, and the keys of the houses were in their possession. Both defendants lived near the mine; Lawrence had worked on it for two years for the Ivanpah Company, of which the plaintiff is the successor; Peterson lived within two hundred yards of it; and, on the day of their entry, they knew that the mine was in charge of the men of the plaintiff, and that the keys of the houses were in their possession. The only issuable question was really the intention with which the defendants entered. They claimed in their answer that they entered in good faith, believing that the ground was vacant, and subject to location according to the mining laws. But a person who knows that a mining claim is in the actual possession of another cannot honestly believe that it is vacant, and subject to entry and relocation; and the entry under such circumstances cannot be made in good faith, unless it is made upon some right, or color of right, or claim of a legal right, to make the entry. Such a claim of right must exist before the entry, to constitute good faith in making the entry. If it does not exist, the entry is made without right or color of title, and is an entry in bad faith; for actual possession in another is *prima facie* evidence of title in the possessor, and is protected by the law against lawless invasion without right or color of right; but one who has a title and present right of possession may always take peaceable possession of what he claims to be his own. In *Townsend* v. *Little*, 45 Cal. 673, the defendant, who was a qualified pre-emptor, and had filed a declaratory statement of her intention to pre-empt a tract of land, which was shown to be part of the public lands of the United States, was allowed to introduce evidence of these things to show her belief of right and good faith in entering upon the land in dispute in that case. And in *Powell* v. *Lane*, 45 Cal. 677, the defendant was allowed to show his patent as evidence of good faith in entering upon the land. (See, also, *Dennis* v. *Wood*, 48

Cal. 368; *Shelby* v. *Houston*, 38 id. 422; *Randall* v. *Falkner*, 41 id. 242.)

But the defendants offered no evidence of right or title. They knew that the mine was in the possession of the plaintiff, and that half a million of dollars had been expended on it; and they admit that they entered upon it, not upon the faith of any title or right in themselves, but to take advantage of what they supposed to be a defect in the title of the plaintiff. For the defendant Lawrence, when asked if he believed that this mine was vacant land, answered as follows: "I did."

"Q.—How did you believe it had become such?

"A.—The reason I believed it was such, they cannot hold more than one mine on a ledge; a company of men cannot hold only one mine on a ledge; they have three locations on the same ledge.

"By the Court.—Did you enter for the purpose of taking advantage of some defect you supposed there was in the title.

"A.—Yes; and it did not belong to them; they could not hold it, and part of the company said it never belonged to them; they never disputed it.

"Q.—Then your only claim was that they was n't allowed by law to hold them; they would n't be allowed by law to hold them.

"A.—Yes, sir.

"Q.—You actually thought they had been holding them?

"A.—I do n't know as they held them; the McFarlanes held them.

"Q.—Did you know that Billy McFarlane held them for this company?

"A.—They had men there to work; I suppose they were working for the company.

"Q.—Now, then, that was your idea as to how it was vacant land; that one company could not hold three claims on one ledge?

"A.—Yes, and they had four.

"Q.—And you thought they could not hold it; you thought they were yet trying to hold them?

"A.—No, I did not. I had information that they had abandoned the whole work, and that the company had busted up.

"Q.—Which did you rely upon? You tell us first one thing—that they could not hold four locations on the same ledge—now you tell us next that you believe the company had abandoned the mine. Now tell us which of these propositions you rely on?

"A.—I rely on both of them.

"Q.—Both of them?

"A.—Certainly.

"Q.—You relied on the company claiming more than they had a right to claim?

"A.—Yes, sir."

It is apparent that the defendants, by their own testimony, did not enter upon the mine under any title or claim of right which they had to the mine. They entered only because they believed or suspected that the plaintiff's claim of title was defective. After their entry without right or color of title, they went through the forms of making a location, and posted a notice thereon, which they caused to be filed in the Recorder's office of the district.

Upon this testimony it was not error for the Court below to refuse to give to the jury the following instruction, at the request of the defendants, to wit: "If the jury believe that the defendants entered upon the mines peaceably and in good faith, believing that they were open to relocation, then the entry was not unlawful, and they are entitled to your verdict." The Court had already correctly given them the law upon the subject, by telling them that if the defendants entered peaceably, in good faith, under claim or color of title, they were entitled to a verdict; and again, if they entered under claim or color of right, peaceably and in good faith, believing themselves to be the true owners, they were entitled to a verdict. Nor did the Court err in instructing the jury that a party cannot enter for the purpose of obtaining title or color of right. He must have it before he entered. This was correct, because, as we have already shown, title or color of right was necessary as a basis upon which they could found their good faith in making the entry. They could not enter without it for the purpose of acquiring it after entry.

Taken as a whole, the entire charge of the Court fully and

fairly submitted the questions involved in the case to the consideration of the jury, and we are not inclined to disturb the judgment, because some of the instructions which were given are subject to mere verbal criticism. (*Brooks* v. *Crosby*, 22 Cal. 42.)

It was also assigned as an error, that the Court erred in sustaining an objection to the following question put to a witness: "Do you know what the *general belief* was in reference to those mines, as to whether they were abandoned or not?" The objection to the question was properly sustained. What was the belief of defendants was admissible upon the question of good faith in making their entry, but the general belief of the community was not an element of their conduct, or in the defense of the case before the Court.

We see no errors in the proceedings which prejudiced the defendants. The verdict is fully sustained by the evidence.

Judgment and order affirmed.

THORNTON, J., and MYRICK, J., concurred in the judgment.

[No. 6,569.—Department No. 2.]

PICO *v.* MARTINEZ.

CLAIM AND DELIVERY OF PERSONAL PROPERTY—REPLEVIN—VALUE—JUDGMENT.—Where, in an action of replevin by the general owner of property against one who has a special interest therein, the property has been delivered to the plaintiff, the true value to be assessed and recovered by the defendant—where the suit goes in his favor—is the value of his special or limited interest in the goods recovered.

CONSTRUCTION OF CONTRACT.—THORNTON, J., concurring specially: P. delivered sheep to M. upon a verbal contract that he should keep them for three years for a certain proportion of the increase. Some months afterward, the contract was reduced to writing. *Held*, that the contract was a continuing one from the time M. first received the sheep, and related to that date.

APPEAL from a judgment for the defendant, in the Seventeenth District Court, County of Los Angeles. FAWCETT, J.

The transcript, as originally filed, contains only the judgment roll. Afterward, on suggestion of diminution of the record, a

printed copy of the statement on motion for new trial was filed. In the findings, it is stated that the sheep and goats were delivered in August, 1877, the sheep then numbering 1,989; and that there remained of said sheep, on April 6th, 1878, only 1,250; that on the latter date, the plaintiff and defendant entered into a written contract respecting said sheep and goats, whereby said defendant was, for a valuable consideration, to take and hold the same for the term of three years from said 6th day of April, 1878, upon the terms and conditions in said written contract specified, none of which said terms or conditions has said defendant broken, or failed to comply with.

The contract appears in the statement, and its material parts are as follows: "Pio Pico, party of the first part, delivers to the party of the second part, Lazaro Martinez, 1,989 head of sheep, which were delivered to him, by order of the party of the first part, by Meliton Alviso, his majordomo; and the party of the second part binds himself, for the term of three years, to care for the said number which was delivered to him by the said Meliton Alviso, and under the following conditions: * * * It is also understood and agreed, that under no pretext shall the party of the second part be able to dispose of any head of said sheep without the consent of the party of the first part. It is understood and agreed, that if the party of the second part shall make default in any part of the stipulations on his part, the party of the first part shall take possession of all the sheep, and this contract shall be null and of no value." The breach relied upon by the plaintiff consisted in the alleged wrongful sale of some of the sheep by the defendant, and the loss of others by his negligence, after the delivery and before the written contract; and with a view of showing this, Meliton Alviso was put upon the stand, and the following proceedings took place:

"Q.—How did Martinez take care of those sheep while they were on the ranchito?

"Objected to by counsel for defendant as immaterial.

"The Court.—That is, at a date antecedent to the written contract?

"Counsel for plaintiff.—Yes, sir.

"The Court.—I think it is immaterial. The objection is sustained. Plaintiff excepted."

The other facts are stated in the opinion, and in the concurring opinion of THORNTON, J.

Glassell, Smith & Smith, for Appellant.

The defendant having only a *special* interest in the property, and the plaintiff being the *general* owner, it was error to give the defendant judgment in the alternative for the *full* value of the property.

The defendant did not prove or allege the value of his special interest. (Wells on Replevin, § 584–586; *Seaman* v. *Luce*, 23 Barb. 248; *Russell* v. *Butterfield*, 20 Wend. 300; *Alt* v. *Weidenberg*, 6 Bosw. 178; *Ingersoll* v. *Van Bophelin*, 7 Conn. 671; *Treadwell* v. *Davis*, 34 Cal. 606; Story on Bailments, § 352; Civ. Code of California, § 3338; Sedgwick on Damages, 585, and note; *Booth* v. *Ableman*, 20 Wis. 21.)

The Court erred in sustaining defendant's objection to the question to the witness Alviso.

Thom & Ross, for Respondent.

It is claimed that the judgment is erroneous; that the defendant has a special interest in the property only, and that the alternative of the judgment should only be for the value of such interest. But the statute itself has, in express terms, declared what shall be the form of the verdict and judgment in actions of this character—namely, for the return of the property, or *its value*. (Code Civ. Proc. §§ 627, 667; *Hunt* v. *Robinson*, 11 Cal. 262; *Nickerson* v. *Chatterton*, 7 id. 568.)

SHARPSTEIN, J.

This is an appeal from a judgment in an action of claim and delivery, and the transcript contains nothing beyond a judgment roll. It appears by the findings that the plaintiff let to the defendant certain flocks of sheep and goats for the term of three years, from the 6th day of April, 1878, upon certain terms and conditions, with which defendant fully complied. On the 6th day of May, 1878, the plaintiff commenced this action for the recovery of said sheep and goats, or for their value. The Court

found that said sheep and goats were of the value of $1.50 per head, and that the defendant was entitled to judgment for the possession of them, or in case a delivery could not be had, for the value of them, and rendered judgment accordingly. The only question that arises upon these findings is, whether the defendant, who had only a special or limited interest in the property, could recover of the plaintiff, who was the general owner, more than the value of such special or limited interest. The pleadings and findings show that the defendant had only a limited or special property in the sheep and goats replevied, and that the general property in them was in the plaintiff.

In New York and Wisconsin, whose codes are substantially the same as ours, as to the character of the judgment to be rendered in a case like this, it has been held that the true value to be assessed and recovered by the defendant is the value of his special or limited property in the goods replevied. (*Searner* v. *Luce*, 23 Barbour, 240; *Booth* v. *Ableman*, 20 Wis. 21.) There is no finding as to the value of the defendant's special or limited property in the sheep and goats; and in the absence of any statement on motion for a new trial, or bill of exceptions, we are not advised whether there was any evidence of its value before the Court. We are satisfied, however, that the value recovered should have been the value of defendant's special or limited property only in the sheep and goats. We discover no other error in the record.

Judgment reversed, and cause remanded for a new trial.

MYRICK, J., concurred.

THORNTON, J., concurring in the judgment of reversal:

I concur in the judgment in this case, but not on the grounds stated in the opinion of Justice SHARPSTEIN. I am of opinion that if the defendant was entitled to the return of the property, the judgment, as entered, was proper. Under such circumstances he had a right to the return of the property, (for he was then entitled to the possession of it when the action was commenced) and the value was a substitute for the property. Pico could have evaded the payment of the money by returning the property. If Martinez had collected the money under the

judgment, he would have held it as he would have held the property if returned to him, liable to account when the three years period, mentioned in the contract, expired.

The judgment should be reversed because the findings are not sustained by the evidence. The evidence shows satisfactorily that the defendant failed to comply with his contract. This contract was a continuing one from the time the defendant first received the sheep, in August and October, 1877. The contract previously made was only reduced to writing on April 6th, 1878, with some modification which does not affect this decision. The defendant, in effect, acknowledges the receipt of 1,989 sheep by the contract as reduced to writing on the 6th of April. The contract distinctly refers to 1,989 sheep, and makes no reference to 1,250, as found by the Court. (See 25th finding.)

It is stipulated, that under no pretext, shall the defendant dispose of any head of sheep, without the consent of plaintiff. It is established by uncontroverted evidence that the defendant did sell some of the sheep without the consent of the plaintiff, of which he never gave any account to him. Upon the evidence, in my opinion, judgment should have passed for plaintiff.

The article of the contract styled "additional article" allows plaintiff to sell his part of the sheep, or interest, as an *entirety*, but not any particular sheep or any number of head of sheep. That this is the meaning is evident from the further provision of such article, that defendant may be allowed to take the part or interest, *as an entirety*, which belongs to him. He is not allowed to take less than his entire part and dispose of them. This additional article thus does not conflict with the views taken in the first portion of this opinion.

For the reasons above given, in my opinion, the judgment should be reversed, and the cause remanded for a new trial.

[No. 6,530.—Department No. 2.]

PICO *v.* KALISHER ET AL.

ACTION FOR TAKING PERSONAL PROPERTY—TRESPASS DE BONIS ASPORTATIS—PLEADING—EVIDENCE.—In an action for the taking of personal property—the plaintiff alleging ownership and possession of the property, and a taking by the defendant, and the answer consisting of a general denial—no evidence is admissible except as to the ownership and taking.

APPEAL from a judgment for the defendants, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The complaint alleges that on the 15th day of May, 1877, defendants, with force and arms, took from the possession of Ramon and Ysabel Hirigoyen, and drove away, certain property, to wit, 2,000 sheep, the property of said Ramon and Ysabel, of the value, etc.; that on the 29th day of May, 1877, the said Ramon and Ysabel, for value received, by an instrument in writing, sold to the plaintiff said sheep, and assigned to him all claims, demands, and rights of action, against any and all persons for the taking, conversion, or detention of said property. The other facts are stated in the opinion.

Glassell, Chapman & Smiths, for Appellants.

It was clearly proven without conflict that one Rose, as Deputy of Bettis who was a constable, took the sheep, under instructions of defendants Kalisher and Wartenberg, and sold them on their account to satisfy an alleged indebtedness to them, Kalisher being present at the sale.

This clearly made the defendants Kalisher and Wartenberg joint trespassers with him. (*Lewis* v. *Johns*, 34 Cal. 634–5; *Goodyear* v. *Williston*, 42 id. 15, 16; *Stewart* v. *Wills*, 6 Barb. 81; *Savacool* v. *Boughton*, 5 Wend. 172; *King* v. *Danser*, 6 T. R. 242; *McGrunty* v. *Herrick*, 5 Wend. 246; *Earl* v. *Camp*, 16 id. 566; *Kerr* v. *Mount*, 28 N. Y. 665; *Coats* v. *Darby*, 2 id. 520–1; *Tiffany* v. *Lord*, 65 id. 310; *Wehle* v. *Butler*, 61 id. 246.)

Brunson & Wells, for Respondent.

An action for damages only is not assignable. (*Oliver* v. *Walsh*, 6 Cal. 456; *Harne* v. *G. I. W. U. Congregation*, 35 id. 378; and other cases.) The evidence does not show that either of the defendants participated in the taking of the sheep by Rose, or directed their seizure under the attachment.

SHARPSTEIN, J.:

This judgment must be reversed. The evidence shows conclusively that the property was taken by the defendants from the possession of plaintiff's assignors, but the Court finds that it was not. There was some evidence admitted which tended to prove that the property was taken by virtue of an attachment or execution, although none of the defendants pleaded that it was so taken. They simply denied the taking. If the defendants, or any of them, had alleged that the taking was by virtue of an attachment or execution, the judgment would have to be reversed for want of a finding upon that issue. It is unnecessary to state that the defendants are in no better position now than they would be if they had justified in their answer their taking under an attachment or execution. The finding that there was no taking of the property by the defendants is clearly erroneous. If they lawfully took it, and the Court based its judgment upon that ground, the Court should have so found. Under the pleadings, no evidence except as to the ownership of the property and the taking thereof, was admissible. Some evidence, tending to prove a justification, was admitted against the plaintiff's objections, but his counsel, for some reason, failed to have any exceptions to those rulings noted.

Judgment reversed, and cause remanded for a new trial.

THORNTON, J., concurred.

MYRICK, J., concurred in the judgment.

[No. 6,532.—Department No. 2.]

BARROWS ET AL. *v.* KNIGHT ET AL.

MECHANIC'S LIEN—CONTRACTOR—SALE—DELIVERY.—In an action upon a mechanic's lien, it appeared that the plaintiffs, under a contract with the owner, furnished materials and performed labor upon a building; but that such materials were furnished and labor performed more than sixty days before filing the lien, with the exception of two bolts, which were not used in the construction of the building, but which, (it was claimed and found) had been delivered in pursuance of the contract. *Held*, upon the facts stated in the opinion, that it did not appear that this was the case, and a new trial granted.

ID.—QUERY.—Could the plaintiff, under such a contract, in any event, acquire a lien, except for the materials actually used in the construction?

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The facts are stated in the opinion.

Thom & Ross, and *Thom & Stephens*, for Appellants.

The furnishing of the bolts on the 3rd day of January cannot give validity to plaintiffs' lien, because the bolts were not used in the building. At most, plaintiffs could only have a lien for the value of the bolts. To entitle a material-man to a lien, it is essential that the materials should be actually used in the construction of the building. (*Phillips* v. *Wright*, 5 Sand. 361; *Houghton* v. *Blake*, 5 Cal. 24; *Tibbetts* v. *Moore*, 23 id. 215; Houck on Liens, §§ 97, 99.)

J. G. Howard & Glassell, *Smith & Smiths*, for Respondent.

The facts proven show a contract within the meaning of the Code of Civil Procedure, and such contract was not completed until delivery of the last item. (*Thielman* v. *Carr*, 75 Ill. 385; *Chicago Artesian Well Co.* v. *Carey*, 60 id. 73; *Diller* v. *Burger*, 68 Pa. 432; *Singerly* v. *Doerr*, 62 id. 9; *Hazard Powder Co.* v. *Loomis*, 2 Disney, (Ohio) 544; *Fowler* v. *Bailey*, 14 Wis. 141; *Capron* v. *Strout*, 11 Nev. 304; *Skryme* v. *Occidental M. and M. Co.* 8 id. 219; *Stine* v. *Austin*, 9 Mo. 559; *Vito Vili* v. *Dixon*, 12 id. 479; 16 id. 256; 33 id. 31; *Spencer* v. *Barnett*, 35 N. Y. 94.)

It is sufficient to allege and prove that the materials were "furnished to be used" in the building, to entitle the material-man to a lien. It is immaterial whether they were used or not, unless diverted from such use with the knowledge and consent of the material-men. (*Esslinger* v. *Hurbner*, 22 Wis. 602; *City of Crawfordville* v. *Barr*, 45 Ind. 258; *Chicago Artesian Well Co.* v. *Carey*, 60 Ill. 73; Code Civ. Proc. §§ 1183, 1185, 1186.)

It needs no construction. The point has never been decided or raised in this Court. (*Houghton* v. *Blake*, 5 Cal. 240; *Bottomly* v. *Grace Church*, 2 id. 90; *Tibbitts* v. *Moore*, 23 id. 215; *Davis* v. *Livingston*, 29 id. 287.)

All of the above decisions were rendered while the Act of 1862 was in force.

The language of that Act was, "furnished for the construction"; that of the Act of 1868 and of the Code, "furnished to be used in the construction."

Were appellants' counsel right in their construction, the only effect would be to strike out the items furnished but not used. This the Court has done.

Plaintiffs certainly had a lien for materials furnished *and used*. They had sixty days after the completion of their contract. Their contract was not completed until January 3rd, 1877, when the last items were furnished. The subsequent diversion of these materials by defendants from the use for which they were furnished could not have the effect of throwing back the completion of the contract to a prior date.

SHARPSTEIN, J.:

This is an action to foreclose a mechanic's lien upon a house and lot. Judgment was rendered and entered for the plaintiffs. J. De Barth Shorb and two other defendants moved for a new trial, which was denied. From the judgment, and order denying a new trial, defendant Shorb has appealed to this Court.

The Court found among others the following facts:

"On the 19th day of October, 1876, the plaintiffs as such partners, at the special instance and request of the defendant C. A. Knight, commenced, and from time to time, up to and including the 3rd day of January, 1877, continued to furnish materials to be

used in and to perform labor upon the construction of that certain frame dwelling-house erected and now being upon that parcel of land described in the complaint, situated in the County of Los Angeles, and all the materials so furnished were actually used in the construction of said building, except two bolts of the value of $3.50, which were not used in such construction, but were furnished to be so used on January 3rd, 1877."

"On or before the said 9th day of October, 1876, the said defendant C. A. Knight, through the defendant Albert Knight, who was his father and agent, entered into a contract with plaintiffs, by the terms of which plaintiffs agreed to furnish such materials to be used in and to perform such labor upon the construction of said building as should from time to time be demanded; and pursuant to such contract, plaintiffs performed the labor and furnished the materials referred to in the last finding.

"Said contract was completed by plaintiffs on the 3rd day of January, 1877, and not before, and within sixty days thereafter, to wit, upon the 2nd day of March, 1877, plaintiffs duly filed with the County Recorder of Los Angeles County their claim duly verified by the oath of the plaintiff, W. C. Furrey, containing a statement of plaintiffs' said demands, after deducting all just offsets and credits, with the name of the reputed owner C. A. Knight, and the names of said Albert Knight and J. de Barth Shorb, as having or claiming some interest in said lands, and also the name of the person by whom they were employed, and to whom they furnished said materials, to wit, said C. A. Knight, with a statement of the terms, time given, and conditions of their said contract, and also a description of the said property sought to be charged with the lien, sufficient for identification."

It appears by the evidence that the plaintiffs are hardware merchants, and that in the months of October, November, and December, 1876, they furnished various articles of hardware to the defendants, Knights, father and son, to be used in the construction of the house upon which they seek in this action to enforce a lien. The understanding was that the house was being built for the son, and the articles furnished by plaintiffs were charged to him, although the father ordered some of them. The only articles which the plaintiffs claim to have furnished after

December 28th, 1876, are two door-bolts, which the Court finds were not used in the construction of the building. One of the plaintiffs testified that these were ordered by Albert Knight a few "days previous to the 12th of December," 1876. If the plaintiffs can be regarded as contractors, and their contract was not completed until these bolts were furnished, then their claim of lien was filed for record within sixty days after the completion of their contract. Otherwise their claim was filed too late. The reason for the delay in furnishing the bolts was, that the plaintiffs did not have them when they were called for in the early part of December, 1876, nor until they had procured them from San Francisco. That the bolts which the plaintiffs furnished were taken by somebody to the premises of the Knights is quite clear, but it does not appear to whom they were delivered, or how they came to be upon said premises. There is no claim that they were delivered to any person before the 3rd of January, 1877, and there is no evidence as to whom they were then or afterward delivered. One Ballard testified that he worked upon the building as a carpenter, and that he obtained the bolts for it of Foster, Howard & Co., on the 11th of December, 1876, and put them on the door, and that the house was finished as early as the 20th of December, 1876. C. A. Knight, one of the defendants, testified that the house was finished on the 18th day of December, 1876, and that no work was done on it to his knowledge after that date. He further testified as follows: "Some time before the house was finished, I ordered two front-door bolts at Barrows & Furrey's, (plaintiffs) but they were so long in delivering them that we were obliged to get another set, which were put on the doors; the pair from Barrows & Furrey were not used, and were in the house when I left San Gabriel. I sent the bolts to Barrows & Furrey, but they refused to take them back."

It does not seem to us that the plaintiffs acquired any right to a lien upon the building for the value of these bolts taken upon the premises by somebody after the completion of the building. The plaintiffs had never entered into any contract to furnish to the defendants, nor had the defendants agreed to procure from the plaintiffs, all the hardware which might be required for the construction of the building. The defendants

did procure some of it from the plaintiffs, and some of it elsewhere. There is no evidence tending to prove that the defendants agreed to wait for the bolts until the plaintiffs could procure them, and we are unable to discover that they were under any obligation to do so. The only contract between the parties was that defendants pay for what they procured of plaintiffs. Under the most favorable construction which we can put upon the law relating to mechanics' liens, the plaintiffs could only acquire under such a contract a right of lien upon the building for the materials actually used in its construction. We are not all of us prepared to go so far as that at present. But we all agree that the claim of lien was not filed within the time limited by law for filing it, and that the Court erred in denying the defendants' motion for a new trial. The appeal from the judgment must be dismissed on the ground that it was not taken within one year from the entry of the judgment. But the defendants' motion for a new trial should have been granted.

Order denying defendants' motion for a new trial reversed, and cause remanded for a new trial.

THORNTON, J., and MYRICK, J., concurred.

[No. 6,533.—Department No. 1.]

LOTHIAN ET AL. *v.* WOOD ET AL.

MECHANIC'S LIEN—NOTICE—CORPORATION.—Knowledge of a fact, concerning the business or affairs of a corporation, acquired by a director or other agent—unless acquired in the management and conduct of its business—does not constitute notice to the corporation. So *held*, in an action against a corporation and its tenant to foreclose a mechanic's lien, for materials furnished in the construction of a building by the tenant on the leased premises—and alleged to have been furnished with the knowledge of the corporation—where it appeared that a director of the corporation, on one occasion, was present during the construction of the building.

ID.—BUILDING—STRUCTURE—DEFINITION.—*Held further*—the property upon which a lien was claimed being "a dancing-hall, swings, and seats"—that, at least, neither the swings nor seats were buildings or structures, (within the intent and meaning of §§ 1183 and 1192 of the Code of Civil Procedure) for which the corporation would be chargeable even with notice.

ID.—VENDOR'S LIEN—JUDGMENT BY DEFAULT.—The tenant defendant having suffered default, the Court adjudged that the plaintiff was entitled to a

vendor's lien for the materials furnished, and that he should have the right to enter upon the premises and to remove and sell the same. *Held*, that the decision and judgment were outside the issues, and against law, and judgment directed to be entered in favor of the plaintiff for a lien upon such interest as the said defendant had in the land at the date of the accruing of the lien.

APPEAL from a judgment in favor of the defendant, the Southern District Agricultural Society, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The facts are stated in the opinion.

Barclay & Wilson, for Appellants.

Woodworth, one of the directors of the corporation, was present, and saw the buildings, while in course of construction. A director is an agent of the corporation, (Civ. Code, § 305) and notice to an agent is notice to the principal. (Civ. Code, §§ 2330, 2332; Story on Agency, 131, 132; Dunlap's Paley's Agency, 262; Wade on the Law of Notice, 311; *Bank of U. S.* v. *Davis*, 2 Hill. 451; *Nat. Security Bank* v. *Cushman*, 121 Mass. 490; *Clerks' Savings Bank* v. *Thomas*, 2 Mo. App. 367; *Roumage* v. *Mich. Fire Ins. Co.* (1 Green) 13 N. J. L. 110; *Toll Bridge* v. *Betsworth*, 30 Conn. 380.) Having a knowledge of the construction of the buildings, the interest of the corporation is subject to the lien. (Code Civ. Proc. § 1192.) The buildings are such as to be subject to the lien. (*M'Creary* v. *Osborne*, 9 Cal. 119; *Hawes* v. *Lathrop*, 38 id. 497; *Merritt* v. *Judd*, 14 id. 60; *Fuquay* v. *Stickney*, 41 id. 583; *Moore* v. *Jackson*, 49 id. 109.)

O'Melveney & Trantum, for Respondents.

If the structure called the "dance-hall" was of such a character as to be subject to a mechanic's lien, (which we deny) still no evidence was introduced by which the Court could distinguish the value of the material used in its construction, from the value of the material used in the construction of the *seats* and *swings*; which clearly could not be the subject of a lien. (Code Civ. Proc. § 1183.) The fact that a director saw the

work going on, was not sufficient to charge the corporation with notice. (Abbott Dig. Corp. p. 542, §§ 13–16, p. 544, § 38; 26 Conn. 374.)

McKEE, J.

Defendant Wood being a tenant of his codefendant—the Southern District Agricultural Society—and in possession of the fair grounds and park of the society, which were located on the N. W. ¼ of section 7, township 2 south, range 12 west, S. B. M., in Los Angeles County, caused to be constructed thereon a dancing-hall, swings, and seats, and the lumber and materials which he used in their construction he procured from the plaintiffs. On the 22nd of May, 1878, the lumber and materials were all furnished. Wood failed to pay for them; and on the 20th of June, 1878, plaintiffs filed a mechanic's lien on the land and improvements, or "such interest as the defendant Wood had in them on the 1st day of April, 1868." To foreclose this lien, plaintiffs brought the action in hand against Wood and the society, in which they sought to make the society chargeable with the lien, upon the ground that it knew of the construction of the "buildings," and did not give notice, according to § 1192 of the Code of Civil Procedure, that it would not be responsible for their construction.

On the trial of the case the Court found, in substance, that the society was the owner of the land; that Wood was in possession of it as a lessee and tenant of the society; that he caused to be constructed upon the land the dance-house, swings, and seats, for his own use and convenience; that he owed the plaintiffs a balance of $384.50 for the lumber and materials which were furnished and used in their construction, and that the owner of the land had no knowledge or notice of their construction. This last finding of fact is complained of as erroneous, on the ground that it is against the uncontradicted evidence in the case.

The record discloses that there was no conflict of evidence upon the subject, and that the whole evidence amounted to this, viz.: that on one occasion one of the directors of the society was present on the land while Wood was erecting the buildings.

The precise time when the director was present does not appear. It may have been when Wood was constructing the swings or the seats, and it is doubtful whether he would be bound to take notice of anything more than what was being done while he was present. But, however that may be, there is no evidence tending to show that he was acting as the special agent of the society when he saw the construction of any or all of the improvements upon the land of the society, or that he had any management or control of its business other than as a director. Nor does it appear that he communicated any knowledge which he may have obtained from his visit to the land, to the society or any of its agents. The director was, it is true, an agent of the society. As such, the knowledge of a fact which concerns the business or affairs of the society, acquired while engaged in the discharge of official duties, or of a matter which had been specially intrusted to him, would be considered, in law, the knowledge of the society; for a corporation can have knowledge only from its agents or records. But unless it was acquired by an agent in the management and conduct of its business, notice of it is not attributable to the corporation. If the agent acquires his knowledge casually, or privately, or by rumor, and he does not inform the corporation or its agents of it, the corporation is not chargeable with it. "I agree," says Chief Justice Nelson, in *The Bank of U. S.* v. *Davis*, 2 Hill, 451, "that notice to a director, or knowledge derived by him while not engaged officially in the business of the bank, cannot and should not operate to the prejudice of the latter. This is clear from the ground and reason upon which the doctrine of notice to the principal through the agent rests. The principal is chargeable with this knowledge for the reason that the agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting in the business, thus delegated to him, it is proper to limit it to such occasions." (See, also, *Fulton Bank* v. *N. Y. & Sharon Canal Co.* 4th Paige, 127.)

So, where a defective deed had been recorded, purporting to convey certain land, and one of the directors of a corporation which had acquired an equity of redemption in the premises, not acting as agent of the corporation, and having no manage-

ment of its business otherwise than as a director, went to the town records for the purpose of ascertaining the situation of the land, and there saw the record of the deed, but did not inform the corporation or any of its agents thereof, the Supreme Court of Connecticut held that the corporation was not, by reason of these facts, chargeable with knowledge of the deed. (*Farrel Foundry Co.* v. *Dart*, 26 Conn. 376.) It follows, therefore, that the personal knowledge acquired by the director of the Agricultural Society—the defendant in this case—of the erection of the improvements by the defendant, Wood, upon the land of the society, is not the knowledge of the society. It did not, therefore, knowingly permit the improvements to be constructed upon its land, so as to make it liable for their construction under the provisions of the Mechanics' Lien law.

Besides, it is doubtful whether all of the so-called buildings, consisting, as already stated, of a dancing-hall, swings, and seats, are fixtures within the meaning of the Mechanics' Lien law, for which the society would be chargeable even with notice. The dancing-hall was a covered structure resting on sills, partly weather-boarded around the sides, and without doors or windows. Each of the swings consisted of two upright posts set in the ground, and braced, and were connected at the top by a cross-piece with rings in it. Whether the "seats" were chairs, benches, stools, or the like, does not appear from the evidence; nor does it appear how much of the lumber and materials were used in the construction of any of them, nor is it designated in the asserted lien itself how much of the amount due to the plaintiffs for lumber and materials which they furnished was chargeable against any one of the improvements, as is required by § 1188 of the Mechanics' Lien law. It was, therefore, impossible for the Court below to find the amount due to the plaintiffs on each of the improvements, so as to give a judgment of lien upon any one of them as distinct from the others.

Moreover, whatever may be said of the dancing-hall, we think that neither swings nor seats are buildings or structures, within the intent and meaning of §§ 1183 and 1192 of the Code of Civil Procedure, for which a lien may be filed, and the owner of land, who may acquiesce in their construction, be made liable. So far as the defendant, the Agricultural Society, is concerned,

there is no error in the judgment of the Court below. But it is otherwise as to defendant Wood; for he had failed to answer the plaintiffs' complaint, and his default for not answering was duly entered. The plaintiffs were, therefore, in Court with their cause of action against him uncontested and admitted. And the Court found that he was in possession of the land as lessee and tenant of the Agricultural Society; and when, in addition to this, the plaintiffs proved the quantity of the land which was required for the convenient use and occupation of the improvements which had been constructed thereon, they were entitled to a judgment of foreclosure against Wood upon the interest he had in the land.

The decision and judgment that the plaintiffs were entitled to a vendor's lien upon the improvements, were entirely outside of any issues made in the case, and were against law.

The judgment in favor of the defendant, the Agricultural Society, is affirmed, and the judgment in favor of the plaintiffs against defendant Wood is reversed, with instructions to the Court below to enter up judgment upon the finding in favor of plaintiffs for a lien upon such interest as defendant Wood may have had in the land on the 1st day of April, 1878.

McKINSTRY, J., and ROSS, J., concurred.

[No. 6,742.—Department No. 2.]

ROUSSEAU v. HALL ET AL.
REYNOLDS v. HALL ET AL.
BOLEN v. THE SAN GORGONIO FLUMING CO.

PARTY TO ACTION.—In an action to foreclose mechanics' liens against defendants, alleged in the complaint to be partners under the firm name of the San Gorgonio Fluming Co., the San Gorgonio Fluming Co., a corporation, answered, setting up the fact of their incorporation, and alleging title to the property; and judgment was rendered for the sale of the property. *Held*, that the corporation had not been made a party to the suit, and that the judgment as to it was erroneous.

APPEAL from a judgment for the plaintiff, and from an order refusing a new trial, in the Eighteenth District Court, County of San Bernardino. McNEALY, J.

Actions against Hall and others, composing the firm of the San Gorgonio Fluming Co., to foreclose a mechanic's lien on a flume. The defendants commenced the construction of the flume October 18th, 1876, and the plaintiffs performed labor thereon from October 19th, 1876, to July, 1877. On the 13th day of February, 1877, the San Gorgonio Fluming Co. was incorporated. The corporation answered, and judgment was rendered against it. The appeal was taken by the corporation.

J. D. Boyer, and *Bicknell & White*, for Appellants.

Talbott & Harris, for Respondents.

By the COURT:

The decree and order denying the motion for a new trial reversed, so far as concerns the San Gorgonio Fluming Company, a corporation. The findings and decree seem to be based upon the fact that the company is a corporation, and as such is indebted to the plaintiffs, and its property is decreed to be sold. The corporation has never been made a party to the action, and has not had a day in court.

[No. 6,876.—Department No. 2.]

PORTER *v.* PICO ET AL.

SHERIFF'S DEED — EXECUTION SALE — ATTACHMENT — RELATION. — A sheriff's deed, executed in pursuance of an execution sale, under a judgment rendered in an attachment suit, takes effect from the levy of the attachment. The attachment lien, though merged in the judgment, still exists, so as to confer a priority in the lien of the judgment, and this result is attained, in an indirect way, by applying the doctrine of relation to the series of acts necessary to be done to transfer title to the property attached.

ATTACHMENT — RETURN — PRESUMPTION. — A return upon an attachment, (or other mesne process) that the officer duly levied the same, is defective in not stating the acts done by the officer in making the service; but such a return is *prima facie* sufficient to show a due execution, though the presumption may be controverted.

ID. — ID. — ID. — CONFLICT OF EVIDENCE — FINDINGS. — In such a case, where the officer testified that it was his custom to levy the attachment by first posting the attachment, with the notice of levy, upon the land, and afterward filing the same in the Recorder's office, (being the reverse of the order prescribed by the statute): *Held*, there was a conflict of evidence, and the finding of the Court, that the attachment was duly levied, was conclusive.

ID.—IRREGULARITY.—The lien of an attachment is not affected by any irregularities in the attachment: but such irregularities are waived by the defendant when he appears, and answers, without taking advantage of them by motion or otherwise.

INJUNCTION—CLOUD UPON TITLE—EXECUTION SALE.—Where a sheriff's sale, though ineffectual to pass title to a purchaser, would yet be sufficient to cast a cloud upon the plaintiff's title, a Court of Equity will enjoin the sale.

ID.—ID.—ID.—EXECUTION—ATTACHMENT—SHERIFF'S DEED—EX-SHERIFF—RELATION.—A sheriff's deed, made upon an execution sale under a judgment in an attachment suit, conveyed to the plaintiff all the right, title, and interest of the judgment debtor, which he had *at the date of the docketing of the judgment, or at any time thereafter*. The defendant, who had obtained judgment in an attachment suit, wherein the attachment was levied upon the same land after the attachment, but before the judgment, in the former suit, caused a special execution to be issued to the ex-Sheriff, (who had levied his attachment) requiring him to sell the interest which the judgment debtor had in the land at the date of the levy of the attachment. *Held*, that the plaintiff's deed took effect by relation from the date of the attachment, and conveyed to him the interest which the judgment debtor then had, and that the sale under the defendant's execution would have cast a cloud upon the plaintiff's title, and was therefore rightly enjoined.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The execution in the defendant's action, referred to in the opinion, was addressed to D. W. Alexander, *late* Sheriff of Los Angeles County, and after reciting the levy of the attachment, the recovery of the judgment, and an order of the Court for the issue of the execution, commanded the said Alexander to sell all the right, title, and interest, which the judgment debtor had in and to the land in question at the date of the levy. The writ substantially conformed to the forms given in the New York text books, cited in the appellant's argument.

The other facts are stated in the opinion.

Glassell, Smith & Smith, for the Appellants.

The deed of the Sheriff purports to convey to the plaintiff only the interest which Celis had in the land "*on the 21st day of April*, 1877, *or at any* time afterward." Under obvious rules of construction the deed conveyed only what it purported to convey. (Code Civ. Proc. §§ 692, 1855–6–7–8; Civ. Code, §§ 1638–9, 1644; *Donahue* v. *McNulty*, 24 Cal. 411; *Wiseman* v. *McNulty*, 25 id. 236; *Hihn* v. *Peck*, 30 id. 288.)

The point was directly involved in *Lamont* v. *Cheshire*, 65 N. Y. 43; S. C. 6 Lans. 234; and was decided in our favor, under provisions of the New York Code identical with ours. (Compare Waite's N. Y. Code, §§ 237, 289, with Code Civ. Proc. §§ 550, 682.)

If the plaintiff in *Rowland* v. *Celis* desired to sell the interest which Celis had at the date of his attachment, he should have caused (as we did) a special execution to be issued, referring to the attachment, and commanding the Sheriff to sell the interest attached. That such an execution issued by us was valid and proper, is expressly alleged in the complaint, and, indeed, the plaintiff's action rests upon this proposition, as otherwise a sale under the execution would not create a cloud. The proposition is also clear, both upon principle and authority. (*Lamont* v. *Cheshire*, cited *supra; McKay* v. *Harrower*, 27 Barb. 463; affirmed in *Sagely* v. *Livermore*, 45 Cal. 614; *Dodge* v. *Porter*, 13 Abb. 253; Thompson Prov. Rem. 439; 4 Waite's Pract. 47; 2 id. 196; *Thacher* v. *Bancroft*, 15 Abb. 243; 1 Crary's N. Y. Pract. 124; 2 id. App. No. 73.)

Possibly, upon the issue of execution in the case of *Rowland* v. *Celis*, the Sheriff was authorized by the Code of Civil Procedure, § 550, (without a special execution) to sell the interest attached, (as was done in *Vigoureux* v. *Murphy*, 54 Cal. 346) but it is clear that *he did not sell or attempt to sell such interest*, but elected to sell an altogether different interest. To sell the interest attached, he should not only have professed to sell it, but should have recited the attachment. (*Wiseman* v. *McNulty*, 25 Cal. 236; *Donahue* v. *McNulty*, 24 id. 411; *Hihn* v. *Peck*, 30 id. 288.) The proposition of the plaintiff is, that, by a fiction of law, a greater interest passed than the Sheriff sold. This is opposed to the principle, "*in fictione juris semper subsistit equitas.*" For it is due to the judgment debtor that purchasers should be informed of the full extent of what is offered for sale; otherwise they would bid only the value of what is offered. The case of *Bagly* v. *Ward*, 37 Cal. 121, does not sustain them. All that was held in that case was, that the effect of the attachment lien was to preserve the priority thereby acquired. This we admit; but we submit that, to preserve that priority, the Sheriff—either under a special execution, or

under the statutory authority of the Code of Civil Procedure, § 550—*must sell the interest attached.*

In this case it does not appear that there was any levy. (Code Civ. Proc. §§ 559, 542; *Sharp* v. *Baird*, 43 Cal. 579; *Main* v. *Tappener*, id. 209; Pract. Act, § 125.)

Brunson & Wells, and *Graves & Chapman*, for Respondents.

Respondent, by the deed upon the Rowland sale, acquired all the interest of Celis in the premises in question which he held on the 26th day of December, 1876, and prior to, and independent of, any lien in favor of appellant Pico. The appellants assail the sufficiency of the levy of our attachment, and rely upon the testimony found in the transcript. But that testimony does not justify appellants' assuming that the statutory order as contended for was not followed. To prove a usual custom can do nothing more than to raise a weak presumption, while the law raises stronger presumptions than that in our favor. When the Sheriff levies an attachment on real estate, and returns the writ of attachment "executed," without setting forth the manner of its service, or showing that he pursued the directions pointed out by the statute, it will be presumed that the attachment was regularly executed. (*Redus* v. *Wafford*, 4 Smedes & M. (Miss.) 579; *Smith* v. *Cohea*, 3 How. (Miss.) 35; *Drake* v. *Collins*, 5 id. 253; *Case* v. *Colston*, 1 Met. (Ky.) 145; *Rowan* v. *Lamb*, 4 Greene, (Iowa) 468; *Webber* v. *Webber*, 1 Met. (Ky.) 18; *Anderson* v. *Sutton*, 2 Duval, 480; *Davis* v. *Johnson*, 3 Munf. 81; *Hefur* v. *Hesse*, 29 La. Ann. 149; *Wood* v. *Terry*, 4 Lans. (N. Y.) 80; *Ross* v. *Reed*, 1 Wheat. 482; *Minter* v. *Crommelin*, 18 How. (U. S.) 87; *Wilkes* v. *Dinsman*, 7 id. 89; *Strother* v. *Lucas*, 12 Pet. 410; *United States* v. *Arredondo*, 6 id. 691; *Guy* v. *Washburn*, 23 Cal. 111; *Todemier* v. *Aspinwall*, 43 Ill. 401; *Jenkins* v. *Parkhill*, 25 Ind. 473; *Kelly* v. *Green*, 53 Pa. St. 302; *Sumett* v. *State*, 17 Tex. 308; *Morse* v. *McCall*, 13 La. Ann. 215; *Hickman* v. *Boffman*, Hardin, 348.) The form of judgment in a suit in attachment is the same as in any other suit, whether there be personal service or not, and when there is personal service, a general execution should be awarded. In either case, the prop-

erty attached is specially liable. (*Young* v. *Campbell*, 10 Ill. (5 Gilm.) 80; *Ames* v. *Wentworth*, 5 Met. (Mass.) 294; *Garey* v. *Hines*, 8 Ala. 837.) Appellants claim that our execution and sale, followed by a sheriff's deed, does not include any title held or secured by our attachment lien, for the reason that our execution was in the ordinary form, while they have discovered a writ denominated a *venditioni exponas*, which operates as a panacea for all such cases. We have examined all the cases and forms to which they referred us in their brief in the Court below. *Sagely* v. *Livermore*, 45 Cal. 614, had reference exclusively to personal property; so also the case of *McKay* v. *Harrower*, 27 Barb. 463.

In *Clark* v. *Sawyer*, 48 Cal. 133, 138, the Court says, Justice RHODES delivering the opinion: "The authorities make a distinction between cases where the *venditioni* issued for the sale of personal property, and where it issued for the sale of land. * * * In England the *venditioni* goes only for the sale of personal property, and consequently the authorities there are all of this class." In that case the Court held that the writ was properly placed in the hands of the Sheriff and not the ex-Sheriff, for the reason that only land being attached the ex-Sheriff held nothing by virtue of his attachment.

The forms referred to in both the 2nd and 3rd Waite's Practice will be found, when read in connection with the subject-matter immediately preceeding them, and to which the forms relate, to be for personal property, and to refer to the case of *McKay* v. *Harrower*, *supra*, for their authority. The same is true of form No. 111, p. 630, Thompson's Prov. Rem., as will be seen at once by referring back to pages 439 and 440.

Upon the strength of the case of *Lamont* v. *Cheslure*, 65 N. Y. 30, appellants contend that our title under the Rowland sale only relates back to April 21st, 1877, the date of the judgment. In that case the principal question discussed and decided, as stated by the Court, was, as to whether attachments with *lis pendens*, filed under the Code, would take precedence of a prior unrecorded deed, of which the attaching creditors had notice, and it was held that they would not. The technical ground mentioned in the last part of the opinion of the Court was not discussed, but was thrown in as an extra apparently, without reflection or mature deliberation.

The lien of the attachment becomes merged in that of the judgment, and the only effect thereafter of the attachment lien upon the property is to preserve the priority thereby acquired, and this priority is maintained and enforced under the judgment. (*Bagly* v. *Ward*, 37 Cal. 121, 131; Drake on Attach. § 224 a.)

A sheriff's deed, executed in pursuance of a judgment obtained in an attachment suit, takes effect by relation as of the date at which the attachment was levied, and overreaches a deed made subsequent to that date. (*Sharp* v. *Baird*, 43 Cal. 577.)

When questions arise as to the title of property claimed through an attachment and the judgment and execution following it, the rights so acquired look back for their inception, not to the judgment, but to the attachment. (*Tyrell* v. *Rountree*, 6 Pet. 464; *Martin* v. *Dryden*, 1 Gilm. (Ill.) 187, 213; *Ensworth* v. *King*, 50 Mo. 477; *Lackey* v. *Seibert*, 23 id. 85, 92; *Wilson* v. *Forsyth*, 24 Barb. 105, 119; *Brown* v. *Williams*, 31 Me. 403; *Hannahs* v. *Felt*, 15 Iowa, 141; *Oldham* v. *Scrivener*, 3 B. Monroe, 579; *Langdon* v. *Raiford*, 20 Ala. 532; *Fullson* v. *Green*, 19 Ark. 376; *Tappan* v. *Harrison*, 2 Humph. (Tenn.) 172; *Miller* v. *Williams*, 30 Vt. 386.)

The judgment, and not the execution or its levy, perpetuates the lien. (*Ensworth* v. *King*, 50 Mo. 477, 482.)

McKEE, J.:

The action is brought to enjoin the defendants from selling the land described in the complaint, under an execution issued upon an order of the late District Court of Los Angeles County, whereby the defendant Alexander, Sheriff of the County of Los Angeles, was commanded to proceed and sell all the title and interest which one E. F. de Celis had in the land on the 2nd day of January, 1877, and which had been on that day levied on by a writ of attachment issued in an action brought by the defendant Pico against the said de Celis. The plaintiff is in possession of the land, claiming to be the owner of it by judgment, execution sale, and sheriff's deed, in an attachment suit, commenced on the 24th day of December, 1876, by one W. R. Rowland against the same judgment debtors, and also by a

sheriff's deed made to him as a redemptioner of the property from a sale made to one A. B. Chapman against the same judgment debtor. In the Rowland case, an attachment was levied on the 26th day of December, 1876; judgment was rendered on the 21st of April, 1877, and was docketed on the same day. The property was sold on the 25th of June, 1877, by an execution issued on this judgment, which commanded the Sheriff of the county to satisfy the judgment out of the real property belonging to the defendant on the day when the judgment was docketed, or at any time afterward. The certificate of sale, and sheriff's deed, transferred to the plaintiff, as assignee of the purchaser at sheriff's sale, "all the right, title, interest, and claim, which the said judgment debtor, E. F. de Celis, had on the 21st day of April, 1877, or at any time afterward, or now has, in and to the lands" described therein.

The case of *Chapman* v. *Celis* was a judgment rendered by a justice of the peace on the 31st of October, 1876. A transcript of the judgment was filed November 1st, 1876, and, by an execution issued thereon, the land in dispute was sold on the 27th of November, 1877. From the purchaser at the sale, the plaintiff, as the successor in interest of Celis, redeemed the land, and on the 8th day of June, 1878, the Sheriff executed and delivered to him, as redemptioner, a deed of all the right, title, and interest, which the "judgment debtor had in the land on the 1st day of November, 1876, or at any time thereafter." Under these conveyances, plaintiff was let into possession of the land, and was in possession when this action was brought.

It is contended that the deed made to the plaintiff as a redemptioner was void, and transferred no title; that the proceedings by attachment in the Rowland case were irregular and defective, and created no lien; that the sheriff's deed conveyed to the plaintiff only the estate which the judgment debtor had in the land on the 21st of April, 1877, and that that was subject to the prior attachment lien of the defendant created by the levy of his attachment on the 2nd day of January, 1877.

We think it is clear that a sheriff's deed, executed in pursuance of an execution sale under a judgment rendered in an attachment suit, takes effect from the levy of the attachment, if the levy is such as to create a lien. Now, in the case in hand,

the officer who levied the attachment returned that he "duly levied the same on the 26th day of December, 1876, by attaching, according to law, all the right, title, and interest of defendant E. F. de Celis, in and to the following described real estate"—being the land in dispute. In this return there is an absence of the acts done by the officer in making the levy. But the legal presumption is that the officer discharged the duty required of him according to law, and that the levy had been made in compliance with the directions of the writ. (*Rowan* v. *Lamb*, 4 G. Greene, 468; *Redus* v. *Wafford*, 4 Smedes & M. 579.) The general rule with regard to the execution of mesne process is, that all presumptions are in favor of the regularity of the acts of the officer, and that a return which simply states that the process was executed, is sufficient *prima facie* to show a due and proper execution. (*Ritter* v. *Scannel*, 11 Cal. 247.) But this is a disputable presumption, which may be controverted; and the officer himself was called by the defendants as a witness for that purpose. To the question, "State how you levied that attachment?" he answered, "That special case? no more than all the balance of them; I levied the whole of them the same—all our cases. * * We levied the attachment by posting a notice on the property, together with a copy of the writ of attachment, and also recorded the same about the same time the attachment was put on the land. * * We posted our notice first, levied our writ, posted it up to show the same was levied, and then filed it in the Recorder's office." In this the officer testifies rather as to what was the usual custom of his office in levying writs of attachment, than to the levy of the particular writ in question. Whether the inference from that custom was sufficient to repel the presumption that the office had followed the statutory order in levying the attachment in question, was a matter for the consideration of the Court on the trial of the case, and his decision either way would be a decision upon a conflict of evidence which we would not review.

In *Wheaton* v. *Neville*, 19 Cal. 44, it was decided that two acts were necessary to create an attachment lien, to wit, service on the occupant, or posting on the premises, and filing in the Recorder's office. In *Main* v. *Tappener*, 43 Cal. 206, it was held that both acts must be performed in the order in which

they are named in the statute. In both these cases, the contests were between attaching creditors and purchasers in good faith, for value, each of whom had obtained his deed before the levy of the attachment was completed. In the one case, no copy of the writ of attachment had been filed in the Recorder's office until nearly a month after the purchaser had received his deed. In the other, a copy of the attachment had not been posted on the premises until an hour and a half after the purchaser had paid his purchase-money, and received his deed; and, in both, it was held that the doctrine of relation did not help the purchasers at the sheriff's sales, because the levies of the attachments were not completed before the deeds were delivered to the vendees of the attaching debtor, and that their intervening rights must prevail over the attachment levies. But here no such question arises. The Court below found that the attachment was levied according to law several days before the levy of the attachment in the defendant's case. It was, therefore, a prior lien to that of the defendant. A prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him, in a court of law or equity, to a subsequent claimant. (*Rankin* v. *Scott*, 12 Wheat. 177.) This lien was not affected by any irregularities in the attachment itself, nor was it destroyed by the judgment rendered in the attachment suit. Any irregularities in obtaining it were waived by the defendant to the suit when he appeared and answered, without taking advantage of them by motion or otherwise, in the course of the proceedings. The process is merely auxiliary, and the judgment in the action cures all irregularities. (*Redus* v. *Wafford*, 4 Smedes & M. 579; *Dunn* v. *Crocker*, 22 Ind. 324; *Caruthers* v. *Click*, 1 Iowa, 54.)

The Court had jurisdiction of the parties, of the subject-matter, and of the property which had been taken by the writ of attachment; and any errors of law in the record of the case must be disregarded by a court when the record is introduced collaterally as evidence of title to the property which had been attached. The objections which were made to the affidavit, undertaking, and writ of attachment, were, therefore, properly

overruled; in fact, the affidavit and undertaking were sufficient. Nor was the lien lost or destroyed. In *Bagly* v. *Ward*, 37 Cal. 121, it was held, that "when a judgment is rendered in an attachment suit, and becomes a lien on real property attached, the lien of the attachment is merged in the judgment." But the judgment does not operate so as to release or obliterate the attachment lien. The property attached is still in contemplation of law in the hands of the officer, subject to the judgment. The attachment lien still exists so as to confer a priority in the lien of the judgment. This result is attained in an indirect way by applying the doctrine of relation to the series of acts necessary to be done to transfer title to the property attached. The property is sold under the final process issued on the judgment, but the deed made to the purchaser at the sale, as the last of the series of acts, takes effect from the date of the levy of the attachment, as the first of the series of acts, and perfects the title to the property from the day when it was taken by the officer for the satisfaction of the judgment. (*Stark* v. *Barnes*, 4 Cal. 412; *Sharp* v. *Baird*, 43 id. 577.)

Perhaps it would be more in accordance with the fitness of things to deal with the fact of the levy of the attachment as of an incipient execution, by which the officer has taken into his possession the subject of the levy for the satisfaction of any judgment which might be recovered, and to order him, after judgment, to sell the specific property for that purpose. Under the other practice, the levy of the attachment, upon the principle of *transit in rem judicatam*, becomes merged in the judgment, and the judgment perpetuates the lien of the levy, and the sheriff's deed perfects the title which passes by the sale under the judgment and relates to the date of the levy. Upon these principles, it is not necessary for the Court, in order to enforce priority of lien, to make an order for the sale of the property attached, or to issue a *venditioni exponas*. The execution upon the judgment is a sufficient authority to the Sheriff to sell the real property which he has in his possession, and the deed which he makes relates back to the date of the lien perpetuated by the judgment.

If this be not so, a subsequent attachment lien would give an attaching creditor a lien superior to the title of a purchaser in

an action under a judgment which perpetuates a prior attachment lien.

The case of *Lamont* v. *Cheshire*, 65 N. Y. 30, does not conflict with these views. By § 132 of the New York Code, as it stood in 1859, the plaintiff in an attachment suit was required to file a *lis pendens*, which, from the time of filing, operated as constructive notice to a purchaser or incumbrancer of the property affected thereby; and the question presented for consideration in the case was, whether a person whose conveyance was recorded *subsequent* to the filing of a *lis pendens* in certain attachment suits, was to be deemed a subsequent purchaser or incumbrancer within the meaning of that section. The defendant in the case had, by purchase from the judgment debtor, a month before the filing of the *lis pendens* in the actions, acquired a title regular in all respects except that he had not recorded his conveyance, but the attaching creditors knew of the existence of the deed; and the Court held that the deed of the plaintiff, obtained from the Sheriff at execution sale, although registered, passed no title whatever, when taken with knowledge of the existence of the prior unrecorded deed.

As in that case the title of the judgment debtor had passed to the purchaser before the filing of the *lis pendens* in the attachment suits, so in this the title of the plaintiff, which originated in the levy of a writ of attachment older than that claimed by the defendant, must prevail against the junior lien claimed by the defendant; and as successor in interest of the judgment debtor, the plaintiff was entitled to redeem the land conveyed to him from the Chapman sale, under § 701 of the Code of Civil Procedure. The defendant, Pico, as a judgment creditor, had also the same right; but he failed to exercise it.

No question is made as to the regularity of the proceedings in the Chapman case. The legal effect of the deed to the redemptioner by the Sheriff is the only thing called into question. But so far as the plaintiff's title is concerned, the question is in no way material. The redemption had at least the effect of releasing the plaintiff's land from the sale under the Chapman judgment. That seems to have been the view taken of it by the Court below, and of that the defendant cannot complain, for it is in no way to his prejudice.

Being the owner, and in possession of the land, the plaintiff is entitled to enjoin the threatened sale under the defendant's execution, because, although the sale would be ineffectual to pass title to a purchaser, it would yet be sufficient to cast a doubt as to the validity of the plaintiff's title, and to cast a cloud upon it; and where such is the case, a Court of Equity will enjoin the sale. (*Pixley* v. *Huggins*, 15 Cal. 127; *Fulton* v. *Hanlow*, 20 id. 481; *Thompson* v. *Lynch*, 29 id. 189; *Marriner* v. *Smith*, 27 id. 653; *Ramsdell* v. *Fuller*, 28 id. 42.)

Judgment and order denying motion for new trial affirmed.

MYRICK, J., concurred.

THORNTON, J., concurred in the judgment.

[No. 6,873.—Department No. 2.]

LOS ANGELES WATER CO. *v.* LOS ANGELES CITY.

CONSTRUCTION OF CONTRACT—WATER COMPANY—SPRINKLING OF STREETS.—In a lease of the Los Angeles Water Works, by the defendant to the plaintiff, it was provided that the plaintiff should not dispose of water for purposes of irrigation, but should only take from the river the water necessary for domestic purposes. The defendant took water from the plaintiff's pipes for the purpose of sprinkling the streets of the city; but, while this was done, the plaintiff had on hand of the waters of Los Angeles River more than sufficient for supplying the inhabitants of the city with water for domestic purposes. In an action by the plaintiff to recover from the defendant the value of the water taken, *held*, that the plaintiff was only entitled to receive pay for water furnished to the inhabitants of the city for domestic purposes, and that it had no right to the surplus.

APPEAL from a judgment for the defendant, in the Seventeenth District Court, County of Los Angeles. MCNEALY, J.

The facts are stated in the opinion.

Brunson & Wells, and *Thom & Stephens*, for Appellants.

John F. Godfrey, for Respondent.

SHARPSTEIN, J.:

This is an appeal from a judgment rendered in favor of the defendant, in an action brought to recover $2,500 for water al-

leged to have been furnished by the plaintiff to the defendant for sprinkling its streets.

The defendant leased the Los Angeles Water Works to the plaintiff, "for the sale or delivery of water to the inhabitants of said city for domestic purposes," upon certain conditions, which it agreed to perform. The defendant agreed to lay down pipes of sufficient capacity to supply the inhabitants of the city with water for domestic purposes, and, within two years after the date of the contract, to erect such machinery in connection with the water-works as would secure to the inhabitants of said city a constant supply of water for domestic purposes. The plaintiff further agreed to furnish water for the public schools, city hospitals, and jails, free of charge. And said contract contained the following proviso and stipulation: "Provided always, that the rights and privileges by these presents conceded to said parties of the second part do not embrace to any extent, or have any reference to, the water-works of said city, used for the distribution of water for the purpose of irrigation, or to affect in any manner any rights of irrigation, either existing at present, or which may exist hereafter, except as to the ten inches of water as hereinbefore provided. And it is expressly stipulated and covenanted that said parties of the second part shall not dispose of any water for the purposes of irrigation, but shall only take from said river the water necessary for domestic purposes, as above specified."

Upon the points directly involved in this action the Court found:

"That defendant, from the 1st day of May, 1877, to the 24th day of August, 1878, at various times had taken water from plaintiff's pipes, and had taken the same, without plaintiff's consent, for sprinkling the streets of said city; and that during said time no water has been furnished by plaintiff or used by defendant for that purpose that was not indispensable to said city for sprinkling and watering said streets."

"That no price or rate has been fixed by the City of Los Angeles, or by any other party or persons, for the sale of said water, save the rates fixed by the plaintiff itself, and for its own benefit."

"That on the 1st day of March, 1877, the Council of the

City of Los Angeles duly made, and regularly passed, a resolution providing that the Board of Health of said city should see that certain streets of said city should be properly sprinkled, and kept free from dust; and that since the passage of said resolution, under the direction of said Board of Health, parties contracting with the city have sprinkled the streets of said city, without interference on the part of the plaintiff, until the 24th day of August, 1878."

"That at all times said plaintiff has had on hand of the waters of the Los Angeles River, without objection on the part of the defendant, water more than was sufficient to supply all the inhabitants of said city using the same for domestic purposes, and for the sprinkling of the streets, flushing the sewers, and watering the parks and plazas of said city, and to carry out said contract of 1868; and thereupon the agents of said city took and used the same as needed by said city and its inhabitants for sprinkling said streets.

"The defendant has, from time to time, since the 1st day of May, 1877, taken and consumed of the said water from plaintiff's pipes, for the purpose of sprinkling the streets of said city, to the extent and of the value, according to the rates established by plaintiff, of two thousand two hundred and fifty dollars in United States gold coin."

As we interpret the contract of the parties, the plaintiff is only entitled to receive pay for water furnished to the inhabitants of Los Angeles for domestic purposes. The stipulation is, not to dispose of any water for the purposes of irrigation, or to take from the river any more water than was required for domestic purposes. From the findings of the Court, it appears that the plaintiff did take more than was necessary for domestic purposes, and that the surplus was sufficient for sprinkling the streets. The plaintiff had no right to that surplus, much less any right to dispose of it. We think that all the water above the amount required by the inhabitants for domestic purposes, belonged to the defendant; and that it had a right to appropriate it to its own use under the contract. Water taken for sprinkling the streets was water taken for the purposes of irrigation, within the primary definition of that word, and the plaintiff

expressly agreed not to dispose of any water for that purpose. The judgment of the Court below must be affirmed.

Judgment affirmed.

MYRICK, J., and THORNTON, J., concurred.

[No. 6,541.—Department No. 1.]

ERNST v. CUMMINGS ET AL.

CONTRACT — BOND — FINDINGS.— The defendants, (one as principal, and the other as surety) executed a bond to the plaintiff, conditioned for the performance of a building contract, by the terms of which, the principal agreed to perform the labor and furnish the materials for the construction of the building, and further agreed that no liens by mechanics, material-men, or laborers, should be filed against it; and the plaintiff agreed to pay seventy-five per cent. of the contract price during the progress of the building, upon certificates of the architect, and the balance upon its completion. In an action upon the bond, it appeared that liens were filed upon the building by material-men, and that suits were brought and judgments recovered against the plaintiff and contractor for their foreclosure; that plaintiff had paid all of the contract price but $750, which had not become due at the time of the filing of the liens, and that he paid this balance, and $594 in addition, upon the judgments; and the complaint alleged, and the answer denied, that the surety (defendant) had seasonable notice of the pendency of the foreclosure suits, and that they were properly defended by the plaintiff; but the Court failed to find upon these allegations. *Held*, that the issues were material, and should have been passed upon.

ID. — DEPENDENT PROMISES.— *Held further*, that the promise of the contractor to protect the building from liens, and the promise of the plaintiff to pay, were mutual and dependent, and that the plaintiff was authorized to retain the $750 to meet the liens.

ID.— ID.— Where mutual promises go to the whole considerations on both sides they are concurrent and dependent, and neither party can claim performance, without performance on his part.

APPEAL from a judgment for the defendants, and from an order refusing a new trial, in the Seventeenth District Court, County of Los Angeles. SEPULVEDA, J.

The findings referred to in the opinion are as follow:

"3rd. That the defendant Chisholm did, before the 1st day of September, 1877, furnish the materials, erect, furnish, and turn over to the plaintiff, the building provided for in said contract, 'Exhibit A,' and did in every particular perform and discharge

each and singular the obligations by him assumed in said contract.

"4th. That the plaintiff did not make the payments as agreed upon in said contract 'A,' to defendant Chisholm, during the progress of, or at the completion of said work, and that he owed the defendant Chisholm, (the contractor) at the time of the filing of the liens mentioned in the complaint, and at the completion of said contract by Chisholm, the sum of about $750."

The other facts are stated in the opinion.

Bicknell & White, for Appellants.

The findings are unsupported by the evidence. The agreement referred to provided that no liens should be filed on the building; that Chisholm should furnish all the materials; and that Ernst should not be responsible therefor. The evidence was, that he failed to furnish the materials, that liens were filed therefor, and that Ernst was compelled to satisfy the judgments.

The Court failed to find upon material issues. (*Watson* v. *Cornell*, 52 Cal. 91; *Le Clert* v. *Oullahan*, id. 252; *Swift* v. *Canavan*, id. 417; *Glascock* v. *Ashman*, id. 420; *Phipps* v. *Harlan*, 53 id. 87; *Baggs* v. *Smith*, id. 88; *Johnson* v. *Squires*, id. 37.)

Eastman & King, for Respondents.

No recovery can be had against respondents, because it is shown that there was a failure upon the part of Ernst to perform his contract, and that Chisholm fully performed.

McKINSTRY, J.:

This action is to recover the sum of $594.75 upon a bond attached to a building contract. The obligation reads as follows:

"Know all men by these presents, that I, Colin Chisholm, as principal, and George Cummings, as surety, all of the City and County of Los Angeles, State of California, are held and firmly bound into H. Ernst, of the same place, in the sum of $1,500, gold coin of the United States of America, to be paid to the said

H. Ernst, his executors, administrators, and assigns; for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

"Sealed with our seals and dated the 31st day of May, 1877.

"The condition of the above obligation is such, that whereas the above bounden Colin Chisholm has entered into a certain contract with the said H. Ernst to do the carpenter-work, brick-work, plastering, painting, stairs, graining, glazing, plumbing, gas-work, and all the work, and furnish the materials therefor, upon a certain building to be erected on the south-west side of Temple Street, in said city and county, to be known as the Ernst residence, according to the plans and specifications made by Charles W. Davis, architect of said building, and to which specifications and said contract, the latter of which bears even date herewith, reference is hereby made and the same are a part hereof, for all purpose expressive of these contracts and tenor.

"Now, if the above bounden Colin Chisholm shall well and truly perform all the obligations in said contract by him to be performed according to the express terms, meaning, and effect thereof, and furnish the materials and perform the work at the times and in the manner therein stated, then the above obligation to be void, otherwise to remain in full force and virtue.

"COLIN CHISHOLM, [Seal.]
"GEO. CUMMINGS, [Seal.]

"Signed, sealed, and delivered in the presence of Charles W. Davis.

"Indorsed: Bond."

The portions of the contract between plaintiff and Chisholm which are necessary to be considered are: "And the said party of the first part does hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said party of the second part, his executors and administrators, that he, the said party of the first part, his executors or administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part, as specified, well and truly pay, or cause to be paid, unto the party of the second part, his executors, administrators, or assigns, the said sum of $2,650 gold coin of the United States

of America, in the manner following: that is to say, seventy-five per cent. of said sum of $2,650 as the said work shall progress, and in a sum proportionate to the value of the work done from time to time by said second party, and the balance of said sum of $2,650 when the said building herein referred to is complete and ended.

"Provided, that in each of the said cases a certificate be obtained and signed by the said Chas. W. Davis, that he has done his work, so far as done, to his satisfaction; and also a statement of the value of the work so done by him; and it is hereby further agreed by said second party, that *no liens* by mechanics, material-men, or laborers shall be filed against said building, and they hereby waive any right to any mechanic's lien."

The complaint alleges that before the completion of the building, and after defendant Chisholm commenced to erect the same, materials were furnished by certain persons named, to said Chisholm as such contractor, to be used in and which were used in the construction; that each within the statutory time filed his claim of lien against the building, and also filed his complaint in the District Court against the plaintiff, and that summons and complaint were duly served on plaintiff in each action thus commenced. Further, that the present plaintiff in due time filed and served his answer as defendant in each of said actions, and that said actions were consolidated and tried in the District Court together; that within a reasonable time prior to the trial of the consolidated actions the present plaintiff notified defendant Cummings of the pendency and character of the same, and that he failed to appear and defend the actions. That the plaintiff employed eminent counsel to defend said suits, and tendered in court $750, the balance due upon the building contract. The complaint also alleges that the cause came on to be tried, and such proceedings were had that the Court entered its decree and gave judgment in favor of each of the material-men, in a sum named as to each, and after the application of $750 so tendered as aforesaid, there remained a balance of $594.75 still due and unpaid in the aggregate, and constituting a lien on plaintiff's property; that plaintiff here, (defendant in said consolidated actions) in order to save his property from said lien and judgment, and while the judgment was in full force, paid the said sum of $594.75, etc.

The defendants, in their answer, deny that the plaintiff properly defended the actions brought to foreclose the liens of the material-men, and also deny that they had any notice of the pendency of those actions. These denials of allegations in the complaint constitute issues upon which the Court below did not find. The issues were material, and should have been passed upon.

There is another reason why the judgment in favor of the defendants and the order denying the motion for a new trial cannot be permitted to stand. Assuming that the third, fourth, or any other of the findings, can be so construed as to include a finding that plaintiff had not paid any portion of the seventy-five per centum of the contract price (properly payable) when the liens were filed, there is no evidence in the record to sustain a finding to that effect. A reference to the building contract will show that plaintiff was to pay any portion of the seventy-five per cent. only in case of presentation of the architect's certificate, and there is no evidence tending to prove that, prior to the filing of the liens, any certificate was presented calling for more money than was actually paid. The case clearly shows that when the liens were filed, defendant Chisholm had not placed himself in such a position as that any more money was due to him than he had already received. Defendant Chisholm testified: "Ernst (plaintiff) failed to make the last payment of $750, *which fell due upon the completion of his house.*" * * * "At the *completion* of the contract he owed me $750." And on cross-examination: "Ernst and I never had any disagreement about the $750 before the liens were filed." And plaintiff, also, as a witness: "Chisholm never demanded the last installment under the contract, which amounted to $750."

The evidence clearly shows that there was nothing due from the plaintiff Chisholm, when the liens were filed, but that subsequently, and on the completion of the building, $750 would have become due if the liens had not been filed.

The question, whether acts stipulated for are such as that the performance of them is a condition precedent to the right to enforce performance by the other party to a contract, is to be solved, not by any technical rules, but by ascertaining, if possible, the intention of the parties. When a covenant or promise goes only to a *part* of the consideration, and a breach thereof

may be paid for in damages, it is an independent covenant or promise, and an action may be brought for a breach of it without averring performance. But when the mutual promises or covenants go to the whole considerations on both sides, they are mutual (and dependent) conditions, and performance must be averred. "The intention of the parties is to be discovered rather from *the order of time* in which the acts are to be done, than from the structure of the instrument, or the arrangement of the covenants." (See note to *Cutter* v. *Powell*, 2 Smith's Leading Cases, 1.)

Applying these rules to an analysis of the building contract: It was the duty of the plaintiff to pay seventy-five per centum—that is, $1,987.50—of the sum of $2,650, as the work progressed, and in sums proportionate to the value of the work done from time to time, provided that in each case a certificate signed by Davis, the architect, should be presented, showing that the work had been done so far to his satisfaction, and the *value* of such work. In other words, whenever the builder produced the architect's certificate that work not already paid for had been properly done, and the value thereof, it was the duty of plaintiff to pay for such work, provided he should not be called on to pay more than seventy-five per cent. of the whole contract price. Defendant Chisholm promised to protect the property from liens if plaintiff should pay as he had agreed, and plaintiff promised to pay as hereinbefore set forth if defendant should prevent liens from being filed. Plaintiff was not bound to pay any portion of the contract price, which, according to the terms of the contract, had not become due when the liens were filed, but was fully authorized to retain such portion to meet the liens. It cannot be presumed that it was intended that plaintiff should pay the full contract price, and also the amount of liens which Chisholm should permit to be filed in violation of his covenants. The promises of the parties were dependent one upon the other, and were to be performed in the order of time in which performance was contemplated by their agreement.

Judgment and order reversed, and cause remanded for a new trial.

ROSS, J., and MCKEE, J., concurred.

[No. 10,451.—Department No. 2.]

THE PEOPLE v. SMALLMAN ET AL.

LARCENY — DEFINITION—CRIMINAL LAW. — Upon an indictment against S. and his wife for larceny of money, the evidence for the prosecution showed that the prosecuting witnesses delivered money to S. for Mrs. S., according to a previous understanding with the latter that she should invest the money in stocks for the use of the prosecuting witnesses, and tended to show that the defendants obtained the money without any intention of investing it as agreed, and with the fraudulent intent of converting it to their own use. The Court below refused to advise the jury to acquit on the close of the testimony for the prosecution; and, upon the close of the trial, in effect, charged the jury to find the defendants guilty, if they found that they obtained the money in the manner and with the intent above stated, and, afterwards refused a motion for a new trial based on the ground that the verdict was contrary to the evidence; thus, in effect, deciding that the facts stated constituted larceny. *Held*, not to be error.

ID.—ID.—ID.— SUPREME COURT—JURISDICTION— QUESTION OF LAW — DEFINITION—CONFLICT OF EVIDENCE—CONSTITUTIONAL LAW.—Under the late Constitution, the Supreme Court had appellate jurisdiction in criminal cases, on questions of law alone; and such a question is presented—where the verdict is complained of as being contrary to the evidence—only where there is no evidence to establish the charge; and not where there is evidence tending to prove it.

ID. — EVIDENCE — CRIMINAL LAW — RES GESTÆ.— Upon the cross-examination of a witness for the prosecution, an affidavit made by the witness was offered by the defendant, for the purpose of impeaching her testimony. *Held*, that the circumstances under which the affidavit was made, and the conversation had by the witness with the person at whose instance it was made, were admissible as parts of the transaction.

ID.—ID. — ID. — ID. — DECLARATIONS. — Upon the cross-examination of the prosecuting witness, the defendants drew out that the witness had consulted one S. in relation to the transaction out of which the indictment grew, and in part developed what had occurred between them. *Held*, that the plaintiff was entitled to call out all that took place between the witness and S., in the consultation referred to.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Municipal Criminal Court of the City and County of San Francisco. BLAKE, J.

The material parts of the charge of the Court below (referred to in the opinion) were as follows: As a general rule, where there is consent there is no larceny, but to this rule there are exceptions. If a person obtains money from the owner by fraud, by undertaking and promising to do with it what he does not intend to do with it, and what he does not in fact do with it, after he has got it into his possession; and if, at the time he is endeavoring to get possession of it, and at the time he

gets possession of it, he intends to appropriate it to his own use; and if, after he gets possession of it, he does appropriate it to his own use, as he intended to do when he obtained the possession; and, if the owner, at the time he parted with the money, did not intend to part with the property in it, but only with the possession of it; and if, in accordance with the arrangement under which the money was parted with by the owner, the money still remained the property of the person from whom it was obtained, and was the property of the person from whom it was obtained at the time it was so converted—the person so obtaining and converting the money is guilty of larceny, and of grand larceny if the money exceeds in value fifty dollars in gold coin of the United States.

If the owner of money delivers it to another person, upon the understanding and agreement between them, that the person to whom the money was delivered, will with it, and for and on behalf of the person from whom it is received, purchase stock or other property for the person from whom the money is received, the money, after the possession of it is parted with, remains the property of the person from whom it was received, till it is invested in accordance with the understanding and agreement before spoken of.

Up to the time of such investment, the person from whom it was received may reclaim it. If the defendants obtained from the Coopers named in the indictment, the money described in the indictment, or a part thereof of greater value than fifty dollars in gold coin of the United States, by promising the Coopers that they, the defendants, would telegraph the same to some person in New York, who would use it in the purchase of stock for the Coopers; and if the defendants, at the time they obtained the money, intended to convert the money to their own use, and did subsequently, not regarding their promise, and in violation of it, convert the money to their own use, in accordance with their original intent so to do: and if the Coopers, at the time they parted with the money, did not intend to part with their property in the money, but only with the possession of it, and if after the money was delivered to the defendants, it was the property of the Coopers, and continued so to be until it was appropriated by the defendants to their own use—the defendants are guilty of grand larceny.

And, if all this has been established by the evidence submitted on the trial, beyond reasonable doubt, and if it has been further so established, that all this transpired in this city and county, the defendants should be declared guilty of grand larceny by your verdict.

The other facts are stated in the opinion.

G. W. Tyler, for Appellants.

The allegation in the indictment is, that the defendants did feloniously steal and carry away $2,000, the property of one William Cooper, and of Margery Cooper, his wife; while the evidence was, that said Coopers gave said $2,000 to the defendants, for the purpose of investing the same in stocks.

Admitting the truth of the facts, as shown by the evidence of the Coopers, still the defendants could not be justly convicted of the crime, under the indictment, for Mrs. Cooper, herself, testified, "I sent a letter to Mrs. Smallman, telling her that the money was ready. She sent up her servant with a message that she was sick, and that she would send up her husband. Up to that time I do not think I had any conversation with Mr. Smallman, about the money. He came up next day or the day after. We went into the parlor; we were there alone. Mr. Smallman said he was in a hurry; I went to the drawer and got the $2,000, and after the greeting of the day, I laid the money on the table. He took it with my consent—with my full and free consent."

If the defendants be guilty of anything, it is of embezzlement, or obtaining money by false pretenses, though the facts of the cause would not support either one of these charges.

If a person can be convicted of larceny under evidence which shows false pretenses, then what is the use of the statutory offense of false pretense? (*Kelly* v. *People*, 13 N. Y. Supreme Court, 500; *People* v. *Wyman*, 4 Hun, 511; Roscoe's Crim. Ev. 7th ed. pp. 453, 626 to 637.)

Attorney-General, for Respondent.

"To constitute the crime of larceny, there must be a felonious taking and carrying away the goods of another. It is supposed

to be *vi et armis*, *invito domino*. But actual violence is not necessary; fraud may supply the place of force. Thus, if the party obtain the delivery of the goods without an intent to steal, a subsequent conversion of them to his own use, while the contract subsisted, would not be felony; but if the original intent was to steal, and the means used to obtain the delivery was merely colorable, a taking under such circumstances would be felony. So, if the goods were delivered originally upon a special contract, which is determined by the fraudulent act of him to whom they were delivered, or by the completion of the contract, a taking *animo furandi* afterward should be adjudged a felony." (*Com.* v. *James*, 1 Pick. 362–384; 2 Wharton's Crim. Law, 1848; *State* v. *De Freese*, 8 Am. Rep. 5: 2 Russ. Cr. L. 9th Am. ed. 102; *Bassett* v. *Spofford*, 45 N.Y. 391; *People* v. *McDonald*, 43 id. 64; *Smith* v. *People*, 53 id. 113; 2 Bish. Crim. Law, § 813; 2 *Rex* v. *Good*, Car. & P. 422; 2 Bish. Crim. Law, § 809; *Loomis* v. *People*, 67 N. Y. 322; *People* v. *Hildebrand*, 56 id. 395; *People* v. *Welch*, 17 Ill. 339; *People* v. *Huber*, 57 Ind. 341; *Regina* v. *Brown*, Beardly C. C. 616; *People* v. *Abbott*, 53 Cal. 284.)

THORNTON, J.:

The defendants were indicted by the Grand Jury of the City and County of San Francisco for the crime of grand larceny. They were charged in the indictment with feloniously stealing, taking, and carrying away, contrary to the form, etc., 100 pieces of the current gold coin of the United States of the denomination of double eagles, or $20 pieces, and of the value of $20 each, said money being the property of William Cooper and Margery Wells Cooper. The defendants pleaded not guilty to the indictment, and on the trial the jury found them guilty as charged. They then moved an arrest of judgment, and for a new trial, which were denied. Sentence was pronounced by the Court, from which sentence, and the order denying a new trial, this appeal is prosecuted.

On the trial several exceptions were reserved to the admissibility of the evidence, which we will proceed to consider. The above-named Margery Cooper was called as a witness by the

prosecution, and examined. On her cross-examination, counsel for the defendants offered, for the purpose of affecting her credibility, an affidavit made and signed by her on the 16th day of January, 1879. It also came out on the cross-examination that the affidavit was written by one Carey, who presented it, and read it to the witness, when she signed it, and swore to it. The evidence tended to show that at this time Carey was employed by the defendant, Amelia Smallman, to draw this affidavit, and have it signed and sworn to by the witness; afterward there was direct testimony to this effect. On the redirect examination, the witness was asked as to the circumstances under which the affidavit was made, and what conversation she had with Carey about it.

The defendants objected to any conversation of witness with Carey in relation to this affidavit, which was had in the absence of defendant Amelia. The Court overruled the objection, and admitted the evidence, to which the defendants excepted. We see no error in this ruling. It was proper to ask the witness as to every matter which occurred in relation to, and in connection with, the affidavit. The conversation had about it while it was being prepared and signed, and the oath made to it, were parts of the transaction, which were as properly admissible as the affidavit itself.

The defendants, on the cross-examination of the above-named William Cooper, drew out the fact that the witness had consulted, in relation to the transaction out of which the indictment grew, F. E. Southerland, and in part developed what had occurred between them as to the matter. The plaintiff was permitted to call out, on cross-examination, against the objection and exceptions of defendants, all that had taken place between the witness and Southerland in the consultation or consultations inquired about. We see no error in this ruling of the Court.

Sarah Selleck was called as a witness by the defense. It appears that she was called to impeach Margery Cooper by proving a statement contradictory to what Mrs. Cooper had deposed on the trial. She was asked by defendants' counsel the following question; "Did Mrs. Cooper ever request you to go and see Mrs. Smallman in reference to any points in stocks?" The prosecution objected to this question; the objection was sus-

tained, and defendants excepted. Nevertheless, the witness appears to have answered the question. She said: "I never had any conversation with Mrs. Cooper with reference to her procuring Mrs. Smallman to invest money for her in stocks."

This question was then put by counsel for defendants: "Did Mrs. Cooper ever ask you to intercede for her and get Mrs. Smallman to invest any money in stocks for her? to intercede with her?" To this the prosecution objected. The Court sustained the objection, and defendants excepted. This ruling is now assigned as error on behalf of defendants.

If this question was intended to impeach Mrs. Cooper, by showing she had made contradictory statements, the predicate had not been laid for so doing, by interrogating her in relation to them. If to show the relations existing between Mrs. Smallman and Mrs. Cooper, the character of those relations so clearly appears from the testimony which was adduced before the Court, that we cannot see that the defendants were injured by disallowing it. It does not appear that there was any conflict in the testimony as to the character of the relations existing between Mrs. Cooper and Mrs. Smallman; nor was any question made in relation to it. The testimony clearly shows that they were on intimate and friendly terms. The witness, (Mrs. Selleck) having just deposed that she never had any conversation with Mrs. Cooper with reference to her procuring Mrs. Smallman to invest money for her in stocks, we cannot discern any error committed by the Court in refusing to allow the question.

We find no error in the record or the rulings of the Court in relation to admitting or excluding testimony, nor did the Court err in refusing to advise the jury to acquit defendants at the close of the testimony for the People.

The refusal of the Court to grant a new trial was attacked for the errors above referred to, and on the further grounds that the verdict was contrary to law, and that it was contrary to the evidence—that the evidence clearly showed that there was no larceny.

The Court, at the instance of defendants, gave to the jury the following instruction:

"If the jury believe, from the evidence, that the $2,000 was delivered by Mrs. Cooper to Mr. Smallman, with the understand-

ing and agreement that the same was to be invested by him in stocks, and he did so invest it, you should find the defendants not guilty."

The defendants asked the Court to give the following, which was refused:

"If the jury believe from the evidence that Mrs. Cooper gave W. H. M. Smallman the $2,000 of her own free will, with the understanding and agreement that he was to invest the same or have the same invested in stocks, either in her own name or otherwise, then you should find the defendants not guilty."

This request was too narrow. If given, it would have withdrawn from the consideration of the jury the testimony connecting the other defendant with the matter under investigation. An instruction which goes to the acquittal of defendants must be broad enough to cover the essential facts of the case. There was no error in the refusal of this request, nor do we discover any error in the refusal of the request numbered two, (2) asked by the defendants.

We have fully examined and considered the charge which was given to the jury by the Court below, and find nothing in it which should induce a reversal of the judgment.

We cannot say that the verdict was against law or contrary to the evidence. There was conflict in the evidence, but there was not a lack of evidence.

The former Supreme Court to which this appeal was taken, as is true of this Court, was invested with appellate jurisdiction in such criminal cases as could come before it, on questions of law alone. (Constitution as amended in 1862, art. vi, § 4; Constitution of 1879, art. vi, § 4.) When there was no evidence to establish the charge set forth in the indictment, it would present a question of law, on which the former Court and this Court would be competent to act. This would not be the case where there was evidence tending to prove the guilt of the accused.

For the foregoing reasons the judgment and order must be affirmed, and it is so ordered.

MYRICK, J., and SHARPSTEIN, J., concurred.

[No. 6,744.—Department No. 1.]

CARR v. THE CENTRAL PACIFIC RAILROAD CO.

LEGISLATIVE GRANT — CONSTRUCTION — TIMBER — DEFINITION.— By the Act of Congress of July 1st, 1862, entitled "An Act to aid in the construction of a railroad, etc.," the timber growing on the odd-numbered sections of public mineral land of the United States was granted to the Central Pacific Railroad Company of California; and under the term *timber* is included all trees and wood. *Held*, accordingly, that a subsequent patentee of such lands took no title to the timber.

APPEAL from a judgment for the defendant, in the Fourteenth District Court, County of Placer.

Action for trespass in entering upon and taking timber from plaintiff's land, described as an odd-numbered section. The plaintiff claimed under a patent issued upon a mineral claim, of date Dec. 9th, 1873. The defendant, in its answer, alleged that the timber was granted to its predecessor, the Central Pacific Railroad Company of California, by the Act of Congress of July 1st, 1862, entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean," etc. The judgment recites that, by consent of the parties, the plaintiff's patent was made part of his pleading, and that the cause was submitted to the Court upon the pleadings.

W. H. Bullock, for Appellant.—There is but one question to be decided in this case, and that is: Who is entitled to the timber upon this land? Plaintiff claims it by virtue of his patent, issued December 9th, 1873. There are five reservations in this patent, and there is no reservation of timber at all. The defendants claim that they are entitled to the timber under the Act of Congress of 1862. (Reads act.) It is under that that the railroad company claims the timber.

Mr. Justice MCKINSTRY, *presiding.*—The words of the grant are very broad. We all think that this judgment will have to be affirmed. The language seems to be about as broad as it can be: that "the timber thereon is hereby granted." The only possible doubt would be as to whether "timber" included all trees and wood.

Hale & Craig, for Respondent.—There is no controversy as to that, I understand.

Mr. Justice MCKINSTRY.—Judgment affirmed.

[No. 10,518.—Before MORRISON, C. J.]

EX PARTE COHN.

CONTEMPT—ENFORCEMENT OF DECREE OF DISTRIBUTION—ESTATES OF DECEASED PERSONS.—Disobedience of a decree of distribution by an executor or administrator is a contempt of court, and the decree may be enforced by proceedings under the provisions of the Code of Civil Procedure relative to contempt.

ID.—HABEAS CORPUS—JURISDICTION.—The functions of the writ of *habeas corpus*, when a party who has appealed to its aid, is in custody under process, do not extend beyond an inquiry into the jurisdiction of the Court by which it was issued, and the validity of the process upon the face.

ID.—ID.—ENFORCEMENT OF DECREE OF DISTRIBUTION—ESTATE OF DECEASED PERSON.—*Held* accordingly, upon an application for discharge upon a writ of *habeas corpus* by an executor who was in custody under an order of the Superior Court, adjudging him guilty of contempt in refusing to pay over money under a decree of distribution, that the Court had jurisdiction, and, the proceedings being regular and valid on their face. that the prisoner was not entitled to a discharge.

APPLICATION for release on a writ of *habeas corpus*.

The facts are stated in the opinion.

A. C. Searle, and *J. B. L. Brandt*, for the Prisoner.

MORRISON, C. J.:

The petitioner complains that he is unlawfully imprisoned, confined, and restrained of his liberty, by one Thomas Desmond, Sheriff of the City and County of San Francisco; and the Sheriff, in his return to the writ of *habeas corpus* directed to him, shows that he holds the petitioner under commitment issued out of the Superior Court of the City and County of San Francisco, in a proceeding for contempt pending in that Court.

The facts established on the hearing are, that Isador Cohn, as executor of the estate of one Solomon Cohn, filed his account in the late Probate Court of the City and County of San Francisco, on the 1st day of December, 1879, from which it appears

that there was then due from him to the estate the sum of $5,941. This amount had been received by him in money, and should have been in his hands at the time the foregoing account was rendered.

On the 13th of March, 1880, a petition was duly filed in the Superior Court of the City and County of San Francisco, (which Superior Court has succeeded to the powers and jurisdiction of the late Probate Court) for a partial distribution of the estate of Solomon Cohn, in which petition it was set forth and shown that Isador Cohn had then in his hands, as executor, more than $5,000 in money belonging to the estate of Solomon Cohn. And on the filing of such petition for partial distribution, an order to show cause was duly issued by the Superior Court, returnable on Monday, the 26th day of April, 1880. On the next day, (April 27th) Isador Cohn was cited to show cause why an order of partial distribution should not be made in accordance with the prayer of the petition. On the 26th day of April, (the day named in the citation) the hearing of the petition came up regularly before the Superior Court, and an order was thereupon entered, directing Isador Cohn to pay over certain sums of money in the order mentioned, amounting in the aggregate to the sum of $5,000. This order recites, "*That more than the sum of* $6,000 *is now in the hands of said executor, Isador Cohn, the sole executor of the estate of Solomon Cohn, deceased, property of said estate, and that there are no debts.*"

The petitioner, Isador Cohn, was served with a copy of the above order or decree of the Superior Court, on the 29th day of April, and a demand was made upon him to pay over the moneys held by him as executor, in accordance with the terms of the decree.

Isador Cohn neglected and refused to pay over such moneys, and an affidavit to that effect was presented to the Superior Court of San Francisco on the 29th day of April, whereupon an order of attachment for contempt was duly issued against him. In pursuance of this order, a writ of attachment was issued, and Isador Cohn was thereupon brought before the Superior Court, to show cause, if any he had, why he should not be punished for contempt in failing to obey the order and decree of partial distribution; and afterward such proceedings were

had in the case, that Isador Cohn was, on the 10th day of May, adjudged guilty of contempt of court.

This order recites all the proceedings had in the case, including the following: "And this Court having fully investigated the charges and premises, and having heard the answer and witnesses of said Isador Cohn, executor, to the same, has, on mature deliberation, determined that said Isador Cohn, said executor, is guilty of the charge of refusing to obey said order of partial distribution, and of a contempt of this Court in so refusing to obey said order. And it further appearing to this Court, on said examination, that said Isador Cohn, executor, had, before the making of said order of partial distribution, received more than the sum of $5,000 of the moneys of said estate as such executor, and, at the time of the making of said order of distribution and demand, had not paid out the same, or any part of it, to said estate, or to any person entitled to the same; it is further by this Court ordered, that said Isador Cohn be imprisoned in the county jail of the City and County of San Francisco until he shall comply with said order, or be otherwise discharged."

Upon this order a commitment was issued, and on the hearing of this writ all the foregoing papers and proceedings have been made a part of the return.

The first ground relied upon for the discharge of the prisoner is, that he is not able to comply with the order. The petition shows that, on the hearing before the Superior Court, Isador Cohn testified that he was unable to comply with the order of partial distribution, owing to the insolvency of his affairs; that his creditors, without his knowledge, connivance, or consent, had attached all of his property and assets for money justly due them; that he had employed all the means within his power to obtain money to enable him to comply with the order and decree of distribution, but all his efforts had been fruitless and unavailing, etc. It is therefore claimed that the order imprisoning the petitioner amounts in effect to perpetual imprisonment. But this question was directly presented to the Superior Court, and that Court found that more than *six thousand dollars is now in the hands of said executor belonging to the estate of Solomon Cohn, deceased.* Was there not sufficient evidence to

justify such findings? I am of opinion that there was. His account rendered in December shows a large balance then due to the estate, and no satisfactory explanation is given of the loss of the money since that time. What has become of it? Has he voluntarily and contumaciously disabled himself from doing the act required of him by the decree, and thus brought himself within the rule laid down by this Court in *Galland* v. *Galland*, 44 Cal. 475, or is his answer a mere sham, void of all truth, and utterly unreliable? Certain it is, that he had the money in his possession—money held by him in a fiduciary capacity; money belonging to infant heirs of Solomon Cohn; a sacred trust, which should have been discharged by him with the strictest fidelity and the utmost good faith, and when the time arrives for him to discharge that trust, he shields himself behind the plea of disability. If the simple statement of a delinquent and dishonest executor could be heard, to relieve him under such circumstances, it would be useless for courts to attempt to enforce, by process of contempt, obedience to their orders. A faithless and dishonest trustee would always be found willing to plead such a defense, and to support such plea by a false oath. I repeat, that the Court before which the matter was heard found adversely to petitioner on this plea, and that finding I am not inclined to controvert.

It is further claimed that the Superior Court had no power to enforce its decree by commitment for contempt: that the parties to whom the money was to be distributed should have brought an action for the recovery thereof. The objection to the proceeding is fully covered by the late case of *Ex parte Smith*, 53 Cal. 204. There it was distinctly held that the Probate Court could enforce a decree of distribution under the provisions of the Code of Civil Procedure relative to contempts, and that disobedience of an order of distribution of an estate is a contempt of court.

It clearly appears that the Superior Court had jurisdiction, and that the proceedings are regular and valid upon their face. These facts bring the case within the rule laid down in *Ex parte McCullough*, 35 Cal. 97, where it is said: "It is well settled that *habeas corpus* can be put to no such use, and that its functions, when the party who has appealed to its aid is in custody

under process, do not extend beyond an inquiry into the jurisdiction of the Court by which it was issued, and the validity of the process upon its face." The same is the rule found in *Ex parte Hartman*, 44 Cal. 32. The Judge there says: "The order under which the petitioner is held is regular upon its face, and one which the Court had power to make. I cannot extend the inquiry beyond this." And in *Ex parte Max*, WALLACE, C. J., says: "The indictment upon which the judgment is founded is sufficient in all respects; the offense of which the petitioner was convicted was one within the scope of the indictment, and the judgment one which the County Court had authority to render upon the appearance and plea of the petitioner. These conditions constitute jurisdiction; all others involve questions of mere error, and the latter cannot be inquired into upon writ of *habeas corpus*, but only upon proceedings in error." (44 Cal. 581.)

If it be true in fact that the petitioner cannot comply with the order, and that the inability is not the result of his own willful and wrongful act, he can apply to the Superior Court for relief, and, upon a satisfactory showing, that Court will doubtless do him justice.

The petitioner is remanded.

[No. 7,117.—Department No. 1.]

FREEMAN *v.* CAMPBELL.

PARTNERSHIP NOTE—PLEADING—FINDING.—In an action against partners, upon a promissory note signed by their individual names, and not by the firm-name, the complaint alleged, and the Court found, that the defendants were partners, and that they executed the note. *Held*, there was no sufficient allegation or finding that the note was executed by the makers as partners, or for a consideration which passed to the partnership.

PRACTICE — FINDING — APPEAL.— Upon an appeal from a judgment of the District Court, where there was no finding upon a material issue, *held*, that it would be impracticable to return the case to the Superior Court, with directions to find upon that issue alone.

APPEAL from a judgment for the plaintiff, in the Tenth District Court, County of Colusa. KEYSER, J.

The note referred to in the opinion is signed, "W. D. Campbell," "J. Spurgeon."

The answer alleges the filing of petitions in insolvency by the defendants respectively, subsequently to the execution of the note and other demands sued upon; and a supplemental answer alleges their final discharge. The other facts are stated in the opinion.

A. L. Hart, for Appellants.

The findings of the Court do not respond to the defense of insolvency pleaded in the answer. (*Phipps* v. *Harlan*, 53 Cal. 87; *Boggs* v. *Smith*, id. 88; *Shaw* v. *Wandesforde*, id. 300; *Smith* v. *Lawrence*, id. 34.) The note sued upon was not executed by the partnership, but by the defendants individually.

Jackson Hatch, for Respondents.

If the insolvency issue was material, the error committed in failing to find upon it can be remedied by a modification of the judgment, so as to limit its effect to the property of the partnership, acquired before the commencement of the insolvency proceedings. (*Cal. Furniture Co.* v. *Halsey*, 54 Cal. 315.) Or the Court can reverse the judgment, and direct the Court below to find upon the insolvency issue, instead of ordering a new trial. (*Phipps* v. *Harlan*, 53 Cal. 87; *Watson* v. *Cornell*, 52 id. 91; *LeClert* v. *Oullahan*, id. 252; *Swift* v. *Canavan*, id. 417; *Glascock* v. *Ashman*, id. 420; *Billings* v. *Everett*, id. 661; *Bosquet* v. *Crane*, 51 id. 505.)

MCKINSTRY, J., for the Court, (from the bench):

We believe that there is no sufficient averment in this complaint that the promissory note was executed by the makers as partners, or for a consideration which passed to the partnership. Nor do we think that the findings determine that fact in terms. There is a finding that they are partners, and there is a finding also that they executed this promissory note, but no distinct finding that it was a partnership note, or that those persons executed it as partners.

We find also in respect to the matter of insolvency, which is alleged in the answer, and upon which there is no finding in the record, that (inasmuch as the appeal was taken from the District Court prior to the date when the Court went out of existence) it would be impracticable to return the case to the Superior Court, with directions to find upon the issue in respect to insolvency alone; and the case can only be disposed of by ordering that the judgment be reversed, and cause remanded to the Court below, where the parties can make such application for amendment of the proceedings as they may be advised is for their interest.

Judgment reversed, and cause remanded for further proceedings.

[No. 7,161.—Department No. 2.]

CLARK *v.* SUPERIOR COURT OF LASSEN COUNTY.

JURISDICTION—JUDGMENT—APPEAL.—If, after acquiring jurisdiction of the parties and the subject-matter, a Superior Court should order judgment for one of the parties without a trial, such judgment would not be "without or in excess of the jurisdiction" of the Court, although it might be erroneous; and in such case the only remedy would be by appeal.

APPLICATION for a writ of prohibition to the Superior Court of Lassen County and HENDRICK, J.

The facts are stated in the opinion.

Geo. Cadwalader, for the Plaintiff.

SHARPSTEIN, J.:

This is an application for a writ of prohibition. The grounds upon which the application is based are substantially the following:

Prior to the commencement of the year 1880, one Adam Murdock sued the petitioner herein, in the District Court of the Twenty-first Judicial District of this State in and for the County of Lassen. Issues were drawn in said action, and a trial was had in the month of November, 1879, before the Court, sitting with-

out a jury. The Court took the case under advisement, and on the 24th of November, 1879, adjourned *sine die*. On the 26th day of December, 1879, the Judge of said Court made and signed written findings, and a judgment, (in the form of a decree) in favor of the plaintiff in said action, and forwarded said findings and judgment to the clerk of said Court, with private instructions not to file said judgment until the reporter's fees were paid. The clerk received said findings, judgment, and directions on the 30th day of September, 1879, and they remained in the office without being formally filed until after the new Constitution went into effect. Since then the reporter's fees have been paid, and on the 13th day of April, 1880, the Superior Court of said Lassen County ordered the clerk of said Court "to place said judgment and findings and conclusions of law upon the files and records" of said Court. The prayer of the petitioner is, "that a writ of prohibition issue, annulling the said order" of said Superior Court.

Strictly speaking, it is not the office of the writ of prohibition to annul orders or judgments of courts; and it is sufficiently plain to our comprehension that the case presented is not one in which a writ of prohibition can properly issue. Whatever else may be doubted, there is no room for any doubt as to the fact that the action was one of which the Superior Court had jurisdiction, and could proceed to try and determine it precisely as it might have done if said action had been originally commenced in that Court. The case was transferred to that Court, and was at issue. No question is raised as to the Court having had jurisdiction of the parties or of the subject of the action. Now, conceding for the purposes of this argument, that the Court should have proceeded to try said cause *de novo*, instead of adopting the findings, conclusions, and judgment of the late District Court, it must be obvious that the only remedy for that error is an appeal. If, after acquiring jurisdiction of the parties and subject-matter of an action, a Superior Court should order judgment in favor of one of the parties without a trial, that judgment would neither be "without or in excess of the jurisdiction of such tribunal," although it might be erroneous, as any judgment might be if rendered upon the naked pleadings in a case where the pleadings raised a material issue. This conclusion renders it unnecessary

for us to express any opinion upon the other questions discussed by counsel.

Application denied, and restraining order granted herein vacated.

THORNTON, J., and MYRICK, J., concurred.

[No. 10,478.—Department No. 2.]

THE PEOPLE v. KENNEDY.

INSTRUCTION — BURGLARY — CRIMINAL LAW.— To arrive at the meaning of an instruction of the Court, all the instructions given upon the same point must be considered.

ID. — ID.— ID.— INTENT.— Upon the trial of an indictment for burglary, for entering a barn with intent to commit larceny, it was admitted by the defendant that he entered the barn to sleep, and on waking in the morning, saw some harness there, and stole it; and the Court instructed the jury that every sane person is presumed to intend the consequences of his own acts, and that an unlawful act is done with unlawful intent. It was objected to this instruction, that it in effect directed the jury that an unlawful intent in entering the barn was to be presumed from the unlawful act of stealing; but *held* by the Court, that in view of the other instruction, cited in the opinion, the jury could not have viewed the instruction as conveying this meaning, and could not have been misled by it.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the County Court of San Joaquin County. BUCKLEY, J.

Ansel Smith, for Appellant.

Attorney-General, for Respondent.

THORNTON, J.:

The defendant was indicted for burglary committed by entering a barn owned and occupied by one J. M. Blankenship, in the County of San Joaquin, with intent to commit larceny. The trial resulted in a conviction. The defendant moved for a new trial, which was denied. This appeal is prosecuted from the judgment of the Court, and the order denying a new trial.

It was admitted by the defendant that he entered the barn

above referred to, to sleep; that when he got up in the morning, he saw the harness there, and stole it. All the evidence tended to show that he slept there during the night in question. The case turned on the intent with which the defendant entered the barn—whether or not he entered with intent to steal.

The Court distinctly told the jury that in order to find the defendant guilty, they must find that he entered the barn with intent to steal. The Court further instructed the jury that they must, in determining this question, take into consideration all the evidence before them. As this intent had to be deduced from circumstances, the jury were directed as to the mode in which they were to consider circumstantial evidence, and as to the rules they must apply to such evidence, in deducing an intent therefrom. So far, there is no objection made to the directions given by the Court to the jury, and they are undoubtedly correct.

The Court further instructed the jury that every sane person is presumed to intend the consequences of his own acts, and that an unlawful act is done with an unlawful intent, and at the request of the defendant told the jury that "the mere entry into the barn or building of another is not in itself a crime."

It is contended that as the Court had in effect told the jury that the entry into the barn was not unlawful, by stating to them that it was not criminal, and had further directed them that the law presumed that an unlawful act was done with an unlawful intent; that inasmuch as the only unlawful act before the jury was that of stealing the harness, the direction of the Court was really that the law presumed from the unlawful act of stealing, the unlawful intent upon which they were to find, and that the jury might have inferred from this that the presumption of the law as stated by the Court was binding upon them, and that they were thus in effect told that upon this presumption they must find the intent to exist about which they were to inquire; that substantially the jury were told that they must find the entry with the intent to steal, from the *fact of stealing*. If this is a proper interpretation of the directions of the Court, it is error.

But to arrive at the meaning of such directions, we must look to all the directions given to the jury by the Court. The mean-

ing of the Court below cannot be fairly arrived at by a partial view of what the jury was told was the law by which they should be governed. All that was said to them in relation to the matter should be considered. Now it appears, upon such an examination as is above indicated, that the Court, besides telling the jury in its charge that they must find the intent upon a consideration of all the evidence, further instructed them, on the request of defendant's counsel, as follows:

"The fact that a person steals while in a building is not sufficient, without other circumstances proved, to cast on him the burden of proving himself not guilty of the crime of burglary."

"The intent must be proved the same as any other fact of the case must be proved, by positive evidence, or by the positive evidence of facts, from which the intent shall or can be inferred."

Again, in the instruction numbered IV, which was also given at the request of the defendant, the jury was directed that if the defendant entered the barn referred to, that did not make him guilty of burglary; if he stole or attempted to steal while in it, that the entry and the actual or attempted theft together did not make him guilty of the crime of burglary, unless when he entered, he had in his mind the intent to commit burglary.

With these directions before us, we cannot conclude that the jury could have viewed the language of the Court as conveying the meaning for which counsel contends, nor do we think the jury were or could have been misled by the expression of the learned Judge referred to.

No other point is called to our attention. We find no error in the record, and, for the reasons above given, the judgment and order appealed from are affirmed.

SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 6,349.—Department No. 1.]

SARGENT v. THE LINDEN MINING COMPANY.

INSTRUCTIONS—PLEADING—VARIANCE.—In an action in *indebitatus assumpsit*, for work and labor done in and about the defendant's mining claim, between the 6th day of June, 1876, and the 15th day of November, 1877—the complaint alleging in one count a promise to pay, and in another the value of the work—it appeared from the plaintiff's testimony that there was no understanding or agreement as to how much he was to receive, or as to how he was to receive it, prior to July 5th, 1877; but the Court instructed the jury in effect that, if the plaintiff went to work upon the defendant's mining claim, in June, 1876, under an express contract to receive reasonable wages out of the proceeds of his labor on the mine, without looking to the company personally, and after doing preparatory and unremunerative work at considerable expense, was discharged by the defendant, without good cause, before he had taken out reasonable wages, then the defendant was liable to the plaintiff for such reasonable wages: *Held*, that the instruction was a substantial departure from the case made by the pleadings and the evidence, and could not be sustained.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Eleventh District Court, County of El Dorado. WILLIAMS, J.

Charles F. Irwin, for Appellant.

The instruction was erroneous, and tended to mislead the jury: first because it was not pertinent to any issue made by the pleadings (*Conlin* v. *S. F. & S. J. R. R. Co.* 36 Cal. 404: *Thompson* v. *Lee*, 8 id. 275); and secondly, because there was no evidence upon which to predicate it. (*Mecham* v. *McKay*, 37 Cal. 154; *Bowers* v. *Cherokee Bob*, 45 id. 495.)

Geo. G. Blanchard and *W. W. Likens*, for Respondent.

MORRISON, C. J.:

The complaint in this case contains two counts, the first averring that on the 15th day of November, 1877, the defendant was indebted to plaintiff in the sum of $873.43, balance due on an account for work and labor done and services rendered by plaintiff to the defendant, at defendant's special instance and request, in and about a certain mining claim, between the 6th day of June, 1876, and the 15th day of November, 1877; and the second being substantially the same, with the additional

averment that the work and labor done and services rendered were reasonably worth the sum of $873.43. The case was tried before a jury, and a verdict was rendered in favor of plaintiff for the amount claimed. The appeal is taken from the judgment, and order of the Court denying defendant's motion for a new trial. Numerous errors are assigned on the appeal, only one of which will be noticed, and that is sufficient to call for a reversal of the judgment.

When the evidence was closed, and before the cause was submitted, the Court below, at the request of the plaintiff, gave the following instruction to the jury:

"If the plaintiff went upon the defendant's mine to work in June, 1876, with the understanding and consent with defendant that he should take what is called 'bed-rock' pay, and that the meaning of 'bed-rock' pay is that plaintiff should receive reasonable wages or pay from the mine itself, without looking to the company personally, and that plaintiff with this understanding and consent was compelled with the knowledge of defendant to sink a shaft and run drain drifts, which is dead-work, and did run such drain drifts, tunnel, and sink shafts at considerable expense, then, if the defendant discharged plaintiff before he had taken out reasonable wages or pay without any good cause, it is liable to plaintiff for such reasonable wages, less the amount he has received from said mine prior to such discharge."

It seems to us that the theory of the plaintiff's case, suggested and presented by the foregoing instruction, is a substantial departure from the case made by the pleadings and the evidence. As already stated, the complaint contains two counts, both of which are in *indebitatus assumpsit*, and founded on a contract to pay plaintiff so much money for work and labor done and performed by him at defendant's special instance and request, and the evidence offered by the plaintiff was introduced for the purpose of sustaining this theory.

The plaintiff testified on the trial as follows: "There was no agreement between me and the trustees relative to my working the mine. I had no express agreement with the trustees, is what I mean by not having an agreement; but they knew that I was at work, and made no objection. One of the trustees

worked with me, and others were anxious to know the progress we were making in working the mine. There was no express understanding or agreement between me and the company as to how much *I was to receive, or how I was to receive it*, prior to July 5th, 1877. Since July 5th, 1877, the understanding was that those who desired could continue to work the same as before, and should receive two dollars and a half per day when it came out, from the proceeds of the mine, after first paying the working expenses, it being provided that we were to continue to have work. No time was specified that we were to have work. The only chance for me to get my pay was to be out of the mine. My understanding of the agreement was, that we were to continue to work until we got our pay."

There is no pretense that any agreement to pay the plaintiff out of the proceeds of the mine, was made prior to the 5th day of July, 1877, and the ground upon which plaintiff based his right of recovery for services rendered by him before July 5th was, that he worked upon defendant's mining ground with the knowledge of the officers of the company. If the plaintiff performed work and labor upon the defendant's mine under circumstances which would make the company liable, that liability would simply be to pay plaintiff what such services were reasonably worth. But the instruction of the Court went upon an entirely different theory of the case, and by it the jury was told that if the agreement was that plaintiff was to be compensated for his services from June, 1876, down to November, 1877, out of the proceeds of the mine, and if, before such proceeds yielded such compensation, defendant discharged plaintiff without good and sufficient cause, he had a right to recover what such services were reasonably worth.

The pleadings and the evidence did not authorize the instruction. There must have been an express contract between the company and plaintiff, that he should be allowed to work the mine for a definite or an indefinite time, and pay himself out of the proceeds thereof, for the law would not make such a contract by implication; and it is not pretended that any such contract was made, or that any understanding to that effect existed before the 5th day of July, 1877. The Court, therefore, had no right to extend such contract back to the 6th day of June, 1876.

For the error committed by the Court, in giving the instruction complained of, the judgment and order denying defendant's motion for a new trial are reversed.

McKINSTRY, J., and ROSS, J., concurred.

[No. 10,434.—Department No. 2.]

PEOPLE v. MILES.

MURDER — INSTRUCTION — DEFINITION.— Upon the trial of an indictment for murder, the Court, in effect, instructed the jury that if the deceased was shot by the defendant from behind, and that the defendant at the time of the shooting was concealed behind a fence, and that there were no words, demonstrations, or hostile acts, at that immediate time, on the part of the deceased, and that the deceased was unconscious that the defendant was so concealed until he was shot, the defendant was guilty of murder. *Held*, that the instruction was erroneous.

ID.—ID.—ID. — LYING IN WAIT. — The term "concealed" is not synonymous with "lying in wait." If a person conceals himself *for the purpose of shooting another unawares*, he is *lying in wait;* but a person may, while concealed, shoot another without committing the crime of murder.

ID.—ID.—SELF-DEFENSE.—When a man exercises his right of self-defense, he must be understood to act on the facts as they appear to him; and if, without fault or carelessness, he is misled concerning them, and defends himself correctly according to what he supposes the facts to be, he is justifiable, though the facts are in truth otherwise, and he really has no occasion for the extreme measure.

APPEAL from a judgment of conviction, and from an order denying a new trial, in the Thirteenth District Court, County of Tulare. CAMPBELL, J.

The facts are stated in the opinion.

Brown & Daggett, for Appellant.

Attorney-General, for Respondent.

SHARPSTEIN, J.:

The appellant was indicted for murder, and convicted of manslaughter. He moved upon a bill of exceptions for a new trial, which was denied, and the Court sentenced him to imprisonment in the State Prison for the term of seven years.

There was evidence introduced on the trial which tended to prove that, thirty or forty minutes before the homicide, the deceased and the defendant, in their respective wagons, each accompanied by two other persons, met upon the highway in the vicinity of their homes. The deceased and his friends were in a covered wagon, the latter occupying the front seat, and the former sitting upon a seat in the rear of the wagon. There was a gun in the wagon, and when the two wagons were nearly abreast, the deceased got out of the wagon, seized the gun, and fired at the defendant, but did not hit him. The horses attached to the wagon in which the defendant was riding became frightened, and started to run. The defendant, however, managed to discharge a gun, which he had, twice at the deceased without effect.

The defendant and his party, of which his brother was one, returned to the latter's house and put up their team. The defendant, armed with a rifle, started to go in the direction of his own house by a route which would take him by the house of the deceased. The latter, soon afterward, with his friends, returned to his house, and drove into a corral, and while they were unharnessing his team, he was shot by the defendant, and expired before medical or surgical aid could reach him. There was some evidence of a hostile meeting of the defendant and the deceased on the highway only a few days before the occurrences above narrated, in which they assailed each other with other than deadly weapons. The defense endeavored at the trial to make it appear that the deceased had, on several occasions, in the presence of several persons, threatened to kill the defendant, and that those threats had been communicated to him by the persons who heard them. The defendant testified that, at the time of firing the fatal shot, he saw the deceased in the act, as he (defendant) construed it, of taking his gun from the wagon for the purpose of shooting at the defendant. Among the instructions which the Court gave to the jury was the following:

"If it appears to your entire satisfaction from all the evidence, beyond a reasonable doubt, that the alleged deceased (Ananias Niles) was shot from behind by the defendant, and that the defendant at the time of the shooting was concealed behind a

fence, and that there were no words, demonstrations, or hostile acts at that immediate time made or committed by the deceased; that deceased was unconscious of the fact that defendant was so concealed until he was shot down; then it is immaterial what, if any, threats or demonstrations the deceased had made at any other time or place, for such threats or demonstrations—no matter what they were—would not constitute a defense, and would not make the act of the defendant either excusable or justifiable, but the defendant would be guilty of murder; and if the jury are entirely satisfied from all the evidence, beyond a reasonable doubt, that the facts of the case are as last above stated, then the jury will find the defendant guilty of murder, no matter whether the character of the defendant is good or bad."

This instruction is clearly erroneous. The Court instructs the jury, that if the defendant did all the acts therein enumerated, that then the defendant was guilty of murder. Whenever a Court attempts to give such an instruction, it should be very careful not to omit any essential element of the crime. The question of deliberation and intention are wholly ignored in this instruction. It is quite evident that the Court uses the word "concealed" as the synonym of "lying in wait." If the defendant concealed himself for the purpose of shooting the deceased unawares, then he was lying in wait, which is evidence of deliberation and intention. But a person might, while concealed, shoot another without committing the crime of murder; although there "were no words, demonstrations, or hostile acts at that immediate time made or committed by the deceased." If the deceased had shot at the defendant less than an hour before, and had made threats against his life, which had been communicated to him, it would not simply be a question whether the deceased was actually making a hostile demonstration at the time, but also whether the defendant in good faith and without fault or carelessness, entertained the belief that the deceased was about to execute his threat. For if the defendant, without his fault or carelessness, did so believe, he would not be guilty of murder, though it turned out that he was mistaken. In other words, whenever a man exercises his right of self-defense, he must be understood to act on the facts as they appear

to him. "And if without fault or carelessness he is misled concerning them, and defends himself correctly, according to what he supposes the facts to be, he is justifiable; though they are in truth otherwise, and he really had no occasion for the extreme measure." (Bish. on Cr. Law. 305.) The instruction was not sufficiently comprehensive upon this point. Neither is it correct as an abstract proposition of law.

We have not discussed any other error for which the judgment should be reversed. But the exception to the foregoing instruction was well taken.

Judgment and order reversed, and cause remanded for a new trial.

THORNTON, J., and MYRICK, J., concurred.

[No. 6,639.—Department No. 2.]

ESTATE OF MONTGOMERY.

APPEAL—ESTATES OF DECEASED PERSONS.—An appeal does not lie from an order denying a petition for the revocation of letters.

APPEAL from an order of the Probate Court of the County of Tehama.

The petition alleged, (besides the jurisdictional facts) that the petitioner was the widow of the deceased, and that letters had been issued at her request to J. W. B. Montgomery, the brother of the deceased, and that at the time of the death of the deceased the said J. W. B. Montgomery was his partner. The prayer of the petition was, that his letters be revoked, and letters issued to the petitioner. A demurrer to the petition was sustained, and the petition dismissed.

P. B. Nagle, for Appellant.

This is not an application for the revocation of letters, but for the issue of letters. It was so held by the late Supreme Court in its decision filed May 14th, 1879, and on this ground it was held that a writ of error would not lie to the order. The peti-

tion states all the jurisdictional facts, and prays that letters be issued to the petitioner. Under § 1365 of the Code of Civil Procedure, the surviving partner must in no case be appointed administrator, and we contend that the Probate Court had no jurisdiction to appoint him. (*Cornell* v. *Gallaher*, 16 Cal. 367; *Estate of Pacheco*, 23 id. 476.)

I. S. Belcher, and *Chapman & Garter*, for Respondent.

The judgment is correct, because the petition states that J. W. B. Montgomery was appointed at the request of petitioner. Appellant, therefore, has no statutory right to have respondent's letters revoked. (*Estate of Kirtlan*, 16 Cal. 162.)

It was adjudicated and determined, upon the hearing of the application of J. W. B. Montgomery for letters, that he was a competent person; and this decision is not subject to review, except upon an appeal from the judgment granting letters to him. (*People* v. *Hagar*, 52 Cal. 172.)

SHARPSTEIN, J.:

This is an appeal from an order of the Probate Court refusing to grant a petition for the revocation of letters of administration previously granted and issued to J. W. B. Montgomery.

The Code enumerates the orders from which appeals may be taken to the Supreme Court from Probate Courts. (Code Civ. Proc. § 969.) An order denying a petition for a revocation of letters of administration is not included in the enumeration. Therefore, no appeal will lie from that order.

Appeal dismissed.

MORRISON, C. J., and MYRICK, J., concurred.

[No. 10,515.—In Bank.]

EX PARTE KEARNY.

HABEAS CORPUS—POLICE COURT OF SAN FRANCISCO—INFERIOR COURT—JURISDICTION—CASE CRITICISED.—The Police Court of the City and County of San Francisco is an *inferior court* of limited jurisdiction, whose powers are conferred, and whose duties and modes of procedure are prescribed, by statute, and to which the rule applies that the evidence of its proceedings must affirmatively show jurisdiction of the person of a defendant, and over the subject-matter; and the remark to the contrary, in *Ex parte Murray*, 45 Cal. 455, is *dictum*.

ID.—ID.—ID.—ID.—Where it affirmatively appears from the record of the proceedings of an *inferior court* that a person was tried and sentenced to be punished for an act which is not a crime, the judgment is absolutely void, and a person in custody under such a judgment will be discharged on *habeas corpus*.

CASES DISTINGUISHED.—*Ex parte Watkins*, 3 Peters, 193; 5 Cranch, 173.

ID.—CONSTRUCTION OF ORDINANCE.—To constitute an offense under subd. 3, § 28, of Order No. 697, as amended by Order No. 1,196 of the City and County of San Francisco—which provides that "No person shall address to another, or utter in the presence of another, any words * * having a tendency to create a breach of the peace"—the words must be uttered in the presence of the person whom they tend to provoke to such breach of the peace.

ID.—ID.—POLICE COURT OF SAN FRANCISCO—INFERIOR COURT—JURISDICTION.—The petitioner was in custody under a judgment of the Police Court of San Francisco, condemning him to six months' imprisonment and the payment of $1,000; and the offense charged in the complaint was, that the petitioner "did willfully and unlawfully utter and address to others, to wit, to a large number of persons then and there assembled * * * certain profane words and language, which words and language then and there had a tendency to create a breach of the peace." But there was no averment that the words were "addressed to, or uttered in the presence of," the person of whom they were spoken. *Held*, that the complaint charged no offense, and that the petitioner was entitled to his discharge.

ID.—ID.—ID.—ID.—ID.—A court, (whether superior or inferior) derives its jurisdiction from the law, and its criminal jurisdiction extends only to such matters as the law declares to be criminal; and, when it undertakes to imprison for an offense to which no criminality is attached, it acts beyond its jurisdiction, and the party imprisoned is entitled to his discharge on *habeas corpus*.—THORNTON, J.

APPLICATION of Denis Kearny for writ of *habeas corpus*.

The facts are stated in the opinion.

Clitus Barbour, for Petitioner.

The complaint charges no crime. This Court may look into it to determine the question. (22 Cal. 179; 52 id. 606; 32 Ala. 583; 60 N. Y. 565; 18 Wall. 163.) An ordinance must be

reasonable. (*Ex parte Frank*, 52 Cal. 606; Dillon Mun. Corp. § 253.)

The jurisdiction of the Police Court must appear affirmatively on the face of the proceedings, and in the complaint.

Delos Lake, for Respondent.

It is well settled that it is not a proper function of the writ of *habeas corpus* to review, as on a writ of error, or on appeal, the judgment or determination of any court or judge, civil, military, or ecclesiastic, in any matter of which such court or judge has jurisdiction. When it appears from the return of the officer, having custody of the prisoner, that he is detained by virtue of any process issued upon the judgment of any court having jurisdiction, that is the end of the matter, and the prisoner must be remanded. Jurisdiction is the power to hear and determine, and implies the power to determine erroneously as well as correctly. If, therefore, the Police Court had jurisdiction over the offense charged—that is, over the offense of misdemeanor—then it had the power to hear and determine the case; and its decision is final and conclusive. The statute (2 Hitt. Codes, art. xiv, 473) provides, that "every person *unlawfully* imprisoned" may prosecute the writ. An imprisonment by virtue of an execution issued upon a judgment rendered by a court having jurisdiction, is not unlawful. Section 1486 of the Penal Code requires the Court to remand the prisoner, if it appears that he is detained "by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree." Section 1487 provides the cases in which the court or judge may discharge, where "it appears on the return of the writ that the prisoner is in custody by virtue of process from any court of this State, or judge, or officer thereof"; none of which cover the present case. The following authorities sustain the above propositions. (*People* v. *Mayer*, 16 Barb. 362; *People* v. *Cavanagh*, 2 Parker Cr. C. 650; *People* v. *McCormick*, 4 id. 9; *Case of Prime et al.* 1 Barb. 340; *Ex parte Watkins*, 3 Pet, 193; *Ex parte Parks*, 93 U. S. 18; *In re Truman*, 4 Mo. 181; *In re Harris*, 47 id. 164; *In re Callicot*, 8 Blatchf. 89; *In re Eaton*, 27 Mich.

1; *Crandall's Case*, 34 Wis. 177; *Senler's Case*, 41 id. 517; *Tweed's Case*, 60 N. Y. 559; *Platt* v. *Harrison*, 6 Iowa, 79; *Ex parte Murray*, 45 Cal. 455; *Ex parte Hartman*, 44 id. 32; *Ex parte McCullough*, 35 id. 97; *Ex parte Riley*, 2 Pick. 172; *People* v. *Shea*, 3 Parker Cr. C. 562; *Ex parte Ezell*, 40 Tex. 451; *Ex parte Fisher*, 6 Neb. 309.)

D. J. Murphy, also for Respondent.

The Police Court had jurisdiction both over the person of the petitioner and the subject-matter; and though its judgment may be erroneous, it cannot be void. (*Ex parte Winston*, 9 Nev. 71; *Platt* v. *Harrison*, 6 Iowa, 79; 1 Kent, 647; *Com.* v. *Lecky*, 1 Watts. 67; *Ex parte Kearney*, 7 Wheat. 38; *In re Harris*, 47 Mo. 164; *Ex parte Kellogg*, 6 Vt. 509; *Gray's Case*, 11 Abb. Pr. 56; *In re Eaton*, 27 Mich. 1; *Johnson* v. *U. S.* 3 McLean, 89; *Tweed* v. *Liscomb*, 60 N. Y. 559; *Dyckman* v. *Mayor etc.* 1 Seld. 440; *Fisher* v. *Bassett*, 9 Leigh, 131; *Cox* v. *Thomas*, 9 Gratt. 326; *Hunt* v. *Hunt*, 72 N. Y. 217, (229); *Ex parte Murray*, 45 Cal. 455.) This Court has, in numerous cases, held that the writ of *habeas corpus* cannot be converted into or used as a writ of error or review. (*Ex parte Bird*, 19 Cal. 130; *Ex parte McCullough*, 45 id. 99; *Ex parte Max*, 44 id. 579; *Ex parte Hartman*, id. 32.)

MCKINSTRY, J.:

The Police Court of the City and County of San Francisco is an "inferior court" of limited jurisdiction, whose powers are conferred, and whose duties and mode of procedure are prescribed, by statute, and to which the rule applies that the evidence of its proceedings must affirmatively show jurisdiction of the person of the defendant, and over the subject-matter. The remark to the contrary in *Ex parte Murray*, 45 Cal. 455, is *dictum*. The only question there was, whether the judgment should have shown on its face the particular offense of which the petitioner had been found guilty? There is frequently a difficulty in ascertaining whether a particular court is or is not "inferior" within the meaning of that term as used in the books. In England, probably all courts, except the King's

at Westminster, the King's Bench, Court of Bankruptcy, Exchequer, and Chancery, are treated as inferior courts. (Cowen and Hill's Notes Phillips' Ev., 4th American ed., vol. 2, p. 105.)

It is clear that courts invested with a general common-law jurisdiction in law or in equity are, when exercising their general jurisdiction, superior courts, within the meaning of the rule which accords every presumption in favor of the validity of their judgments. In the United States, however, it has frequently been held that a court may be limited and subordinate in its jurisdiction, and yet not be an inferior court "in the sense that it ought to certify everything precisely." (1 Saund. 74.) And this will explain some of the cases cited by counsel. In several of those cases, it was, in effect, determined that a court holding jurisdiction of all criminal cases should be protected, though it adjudge a matter to be criminal which is not so, and proceed to punish it. (*Ex parte Tobias Watkins*, 3 Peters, 193; 5 Cranch, 173.) The Circuit Court of the United States for the District of Columbia having been determined to be a superior court, with jurisdiction over all crimes, the application of the rule was not difficult, and accordingly it was held, in *Ex parte Watkins*, that the judgment of that Court "was evidence of its own legality, requiring no inspection of the indictment on which it was founded"; and the Supreme Court refused to look at the indictment.

We do not forget that the only difference, ordinarily recognized between superior and inferior courts, is that there is a presumption in favor of the validity of the judgments of the former, none in favor of those of the latter, and that a superior court may be shown not to have had power to render a particular judgment by reference to its record. We only say that, in *Ex parte Watkins*, the Supreme Court of the United States refused to look at the indictment, because the Circuit Court was to be treated as a superior court, with jurisdiction of all crimes.

In other cases, it has been held broadly by the Supreme Court of the United States, that the District as well as the Circuit Courts of the United States are not inferior courts. (Hurd on Habeas Corpus, 365.) It is apparent that decisions, with reference to the conclusive presumptions arising from the

judgments of those courts, can have no influence upon the question, whether the Police Court shall be conclusively presumed to have jurisdiction to render every judgment which it may render, unless the latter, like the former, is a "superior" court. In *Ex parte Murray*, 45 Cal., it was said: "The judgment is one thing—the brief statement (in the minutes) of the offense of which the prisoner has been convicted is a different thing. The former—the *ideo consideratum est*—need contain no recital; it is here, simply, 'that the said Patrick Murray pay a fine of forty dollars,'" etc. Every recital in a judgment, therefore, as to the offense, is surplusage, and if the claim of counsel is well founded, the judgment of the Police Court, that a defendant be imprisoned, determines the power of the Police Court to imprison him. If, however, the Police Court is an inferior court, (whatever the rule as to the superior courts) everything should appear in its proceedings necessary to give it jurisdiction and to justify its judgment. (*Kempe's Lessee* v. *Kennedy*, 5 Cranch, 174.)

There is no certain test by which to determine in all cases to which class, (superior or inferior) any given court belongs. (Hurd on Habeas Corpus, 364.) It is not remarkable, therefore, that there has been some diversity in the application of the rule, as to the presumptions, to particular courts. In New York, the "Surrogate Court" is held to be "inferior," but in Pennsylvania, Maryland, and Alabama, the "Orphan's Court," and in Arkansas the "Probate Court," are held to be "superior." In New York the General Sessions of the Peace in the several counties are held to be "inferior," while in Pennsylvania, Vermont, and Connecticut, a Justice's Court is under the rule said to be "superior." The question seems to have resolved itself into one of public policy, and whether the particular court of the limited jurisdiction ought to have extended to its judgment the sanctity of the presumptions arising from the adjudications of tribunals of general common-law jurisdiction. That the underlying and controlling principle upon which the question must be decided is simply a consideration of correct public policy, is indicated by the language employed by the Supreme Court of Vermont in *Wright* v. *Hazen*, 24 Vt. 143. The Court there says: "We are aware that the decisions in New York, and probably

in some other States, have required the justice to know the facts limiting his jurisdiction at his peril. But no such rule has ever been applied to the courts of general jurisdiction, either in Westminster Hall, or in this country; and the jurisdiction of justices of the peace has become so important and extensive, that we incline to believe sound policy requires of us to extend the same rule of construction in favor of their jurisdiction which is done in favor of courts of general jurisdiction." (Hurd on Habeas Corpus, 366.)

This Court has never extended the rule as to presumptions in favor of the judgments of courts of general jurisdiction, to courts of justices of the peace in California. On the contrary, such courts, in this State, have uniformly been treated as "inferior courts, in favor of whose jurisdiction nothing could be assumed. (12 Cal. 283; 23 id. 401; 33 id. 318; 34 id. 321.) And prior to the adoption of the amendments of 1862 to the Constitution of 1849, and the Act of April 20th, 1863, the Probate Courts in California were always considered as of inferior and limited jurisdiction, to whose "records, orders, judgments, and decrees" were accorded none of the legal presumptions given to those of District Courts in the exercise of their more general jurisdiction. (*Pryor* v. *Downey*, 50 Cal. 388.) So far, then, as analogous decisions of this Court have gone, it would seem that the Police Court should be treated as an inferior court. It would be strange if, while holding the judgments of justices of the peace, in criminal cases, not to carry with them the presumptions accorded the judgments of superior courts, we should determine that those of the Police Court, exercising a jurisdiction, in so far as legislative enactments are concerned, substantially the same, are to be treated as if rendered by a court of general jurisdiction. There are reasons peculiarly applicable to municipal courts which would render it proper that they should be held to be inferior courts. The primary design of municipal courts, so far as they act under city by-laws, is to prevent disorder in matters of local convenience, to regulate public and *quasi*-public easements, etc. As was said by Campbell, J., in *Jackson* v. *People*, 9th Mich. 111: "The Constitution, in apportioning the judicial power, as well as affirming the immunity of life, liberty, and property, has always

been understood to guarantee to each citizen the right to have his title to property, and other legal privileges, determined by the general tribunals of the State." There the judgment of the Recorder's Court, on a complaint for violating a city ordinance, was revised on *certiorari*. And it has been repeatedly held that this may be done, even where, by statute, it is declared that the proceedings of a municipal tribunal "shall be final and conclusive," or "without appeal." (Dillon on Munic. Corp. § 368.)

It is not necessary to say that *habeas corpus* may be resorted to whenever *certiorari* may be, but the jurisdiction employed by the superior courts, by means of *certiorari*, strongly indicates the jealousy entertained of possible excess of authority on the part of municipal tribunals administering by-laws or "prudential regulations" not extending beyond the limits of the municipality. The Constitution does not require the Legislature to provide for an appeal from the judgments of the Police Court to the Superior Court, and it would seem that every consideration of sound policy requires of us to treat the former court as an inferior tribunal, the record of whose proceedings should affirmatively establish its power to pronounce a particular judgment.

The Charter of San Francisco (Consolidation Act, Stat. 1861, p. 552) provides:

"Section 74. The Board of Supervisors shall have further power by order or regulation. * * Eleventh—To determine the fines, forfeitures, and penalties, that shall be incurred for the breach of the regulations established by said Board of Supervisors, and also for a violation of the provisions of this act when no penalty is affixed thereto or provided by law. But no penalty to be imposed shall exceed the amount or value of $1,000, or six months' imprisonment, or both. * * (Chap. 5.)

"The Board of Supervisors of the City and County of San Francisco shall have power by regulations or order * * * Third—To prohibit and suppress, or exclude from certain limits, all houses of ill-fame; * * to prohibit and suppress, or exclude from certain limits, or to regulate, all occupations, * * exhibitions, and *practices*, which are against good morals, contrary to public order and decency, or dangerous to the public safety." (Stat. 1863, § 1, subd. 3, p. 543.)

The Board of Supervisors passed Order No. 697 as amended by Order No. 1,196. Chap. 3, § 1, of said order provides:

"Any persons violating any of the provisions of this chapter shall be deemed guilty of a misdemeanor, and be punished by a fine of not exceeding $1,000, or imprisonment not to exceed six months, or by both such fine and imprisonment."

And § 28 of said chap. 3 provides: * * "No person shall * * 2. Utter in the hearing of two or more persons any bawdy, lewd, obscene, or profane language, words, or epithets. 3. Address to another, or utter in the presence of another, any words, language, or expression, having a tendency to create a breach of the peace."

We shall assume for the purposes of this decision—without admitting the law so to be—first, that we ought not to inquire on *habeas corpus*, with a view to petitioner's discharge, whether the sections of the charter above cited authorized the Board of Supervisors to adopt the Orders 697 and 1,196; second, that we ought not to inquire, except for a limited purpose, whether the ordinance is "reasonable," and one which a municipal government may enforce; third, that we cannot inquire on *habeas corpus* whether the Orders 697 and 1,196 were properly published prior to their passage, inasmuch as they are verified by the signatures of the Mayor and Clerk of the Board.

It is not to be presumed that a court of general jurisdiction —or one which the law treats as such—has, in any case, proceeded to adjudge upon matters over which it had no authority. On the other hand, no such intendment is made in favor of the judgment of a court of limited jurisdiction—an "inferior court" —but the recitals contained in the minutes of the proceedings must be sufficient to show that the case was one "which the law permitted the court to take cognizance of, and that the parties were subjected to its jurisdiction by proper process." (Cases cited in note 1, p. 407, Cooley's Const. Lim.) If indeed the proceedings show that an inferior court has found the existence of a fact on which the right to proceed depends, and, by the constitution of the court, the existence of the fact is a matter placed within the jurisdiction of the court for determination, the adjudication of the inferior court that the facts exist is conclusive. As stated by Mr. Justice Cooley—after he has laid

down the proposition that in case of a court of special and limited authority it is permitted to show a want of jurisdiction even in opposition to the recitals contained in the record: "This we conceive to be the general rule, though there are apparent exceptions of those cases where the jurisdiction may be said to depend upon the existence of a certain state of facts which must be passed upon by the courts themselves, and in respect to which the decision of the court, once rendered, if there was any evidence whatever on which to base it, must be held final and conclusive in all collateral inquiries, notwithstanding it may have erred in its conclusions." (Const. Lim. 407.)

We have assumed that the existence of the ordinances which, as claimed, gave the Police Court the appropriate jurisdiction, and the publication thereof—supposing the publication to be inquirable into by any court—were matters to be ascertained by the Police Court, and that, on *habeas corpus*, we ought not to go behind the finding of the Police Court with respect to such matters. We also assume that the orders or ordinances referred to were proven. We are not called on, therefore, to re-examine the evidence with respect to any fact passed upon by the Police Court.

The records of the Court show that two complaints were made against the petitioner. The first charged him with having uttered, in the hearing of others, bawdy, obscene, and profane language. That charge was dismissed.

As we have seen, nothing is to be presumed, in the first instance, in favor of the judgment of the Police Court. If the record does not show, upon its face, the facts necessary to give the Court jurisdiction, they will be presumed not to have existed. But this presumption (except in California, as to such jurisdictional matters as the law requires to be reduced to writing) may be rebutted, and the jurisdictional facts established by extrinsic evidence. (Hurd on Habeas Corpus, 367.) We have assumed that the fact of the existence of the ordinances which, as was supposed, gave the Police Court jurisdiction, must be presumed to have been established to the satisfaction of that Court, and, for the purposes of this case, the presumption will be held to be conclusive. But the Police Court could not give itself jurisdiction by its construction of an ordinance, when the very question

is, whether the inferior tribunal was given power by the ordinance to try petitioner on the charge on which he was actually tried. It devolved, therefore, upon those whose function it was to sustain the jurisdiction, to produce the ordinances which were proved in the Police Court, in order that it could be ascercertained whether they made the act, for which petitioner was tried, a crime, for the punishment of which the inferior court had power to impose the judgment which was rendered. We take judicial notice that the act charged in the complaint constitutes no crime under the general laws of the State. If the judgment of the Police Court is supposed to derive its validity from a city ordinance, we may assume an ordinance to have been proven, and it would be enough to show, perhaps, that it was admitted as proven by the Police Court. But whether the ordinance gave the Police Court power to punish petitioner for the offense charged in the complaint, is a question of law which we cannot avoid the responsibility of determining. Can it be doubted that if, on proof of an ordinance prohibiting certain unlawful assemblies, the Police Court should proceed to try a defendant, charged with doing some act not prohibited, and to render a judgment, imposing the penalty prescribed for taking part in such unlawful assemblies, the judgment would be void? The complaint would charge no crime known to the law of the land, and the same rule must apply, whether the law conferring jurisdiction on the inferior tribunal is to be looked for in the statutes of the State, or in orders of the Board of Supervisors of San Francisco.

Inasmuch as no presumptions are to be indulged in favor of the judgments of inferior courts, and as this Court will take judicial notice that the facts set forth in the complaint constitute no crime under the general laws of the State, the record of the proceedings in the Police Court should manifest that the petitioner was there prosecuted for an alleged violation of some city ordinance. Either the complaint sufficiently refers to, and so makes part of itself, Orders 697 and 1,196, or it does not. If it does not, there is nothing in the proceedings of the Police Court which show that the petitioner was tried for any offense of which that Court has jurisdiction. We shall assume, however, (as against petitioner) that Orders 697 and 1,196 suffi-

ciently appear from the record, and further, because alleged in the complaint in the Police Court, that they are now properly before us.

As we have seen already, the charge of uttering obscene and profane language was dismissed; it only remains to inquire whether the other complaint charged the crime created by the third subdivision of § 28 of chap. 3 of Order 1,196; since, if it did not charge that crime, it is plain it charged none within the jurisdiction of the Police Court.

The subdivision declares that no person shall "address to another or utter in the presence of another any words, language, or expressions having a tendency to create a breach of the peace." We shall not inquire, in this place, how it accords with constitutional law or the policy of our general legislation, to place the power in the hands of a judge or jury to decide that "any words"—to others, perhaps, apparently innocent—which they may think objectionable, have a tendency to create a breach of the peace. That the language charged in the particular instance now before us was not only indecorous, but in the highest degree indecent, cannot affect the question. The next conviction may be for the use of words less offensive, and the attempted definition of the crime sought to be created by the ordinance is so uncertain, as would leave it to the varied judgments or tastes of successive juries to find defendants guilty or not guilty of a crime for the use of exactly the same language. It may be that the Legislature might declare slander to be a crime, or might authorize a municipal board so to declare. If this were done, however, it can hardly be doubted that the constitutional provisions in respect to libel would apply. The question whether the words spoken were slanderous would be a question for the jury, and the defendant would be allowed to prove, if he could, that the words spoken were true, and that they were spoken for justifiable ends. The provision of the ordinance on which (as is claimed) petitioner was convicted, does not require that words shall be slanderous, and does not permit the defendant to prove either the truth or justifiable intent. Libel is distinguished from slander in that it is supposed to be more deliberate. The freedom of the press is surrounded by many constitutional safeguards. Can a Legislature—*a fortiori*,

a City Council—sweep all these aside by a simple process of calling libel by another name? The Legislature cannot deprive a publisher of a newspaper of his right to prove the truth of a statement alleged to be libelous, and that it was published for justifiable ends. Will it be contended that the printer may be deprived of this great constitutional right by providing that he shall be punished, not for libel, but for the publication of words having a tendency to produce a breach of the peace?

The foregoing will suggest some of the evil consequences which might ensue were we to give the construction contended for by counsel to the third subdivision of section 28 of the chapter, and hold that it covers the case of one who may have used words having a tendency to excite the wrath—in case he should ever hear of them—of a person of whom the words were spoken, although such person may not have been present when the words were spoken, nor may ever have heard them recited. We cannot too often repeat that the alleged circumstances of this particular case should not be appealed to as requiring of the Courts to attribute a forced meaning to the ordinance. It may be admitted, for the purpose of this argument, that the language alleged to have been employed by the petitioner conveyed a vile and perfectly unwarrantable assault upon the character of an honorable man. But it is only when an offense particularly aggravating against morals or justice has been committed, that a temptation arises to distort the law, to expand the meaning of words beyond their plain purport, to give to a penal statute an effect not intended by those who framed it nor required by its language, that we may bring within its scope, and subject to condign punishment, those whom we believe deserve the severest penalties. At such times, if ever, we forget that the worst as well as the best of men is entitled to the protection of the Constitution, and that a strained interpretation of the law which deprives a bad man of his right to personal liberty to-day, may to-morrow deprive a good man of his equally sacred—in the eyes of some of us perhaps more sacred—rights to property.

To constitute the offense, the words must either be addressed to, or spoken in the presence of, the person whom they have a tendency to incite to a breach of the peace, or, on the other hand, they are punishable if spoken anywhere, or addressed to

any third person. Even if the language of the ordinance were ambiguous, we would be compelled to reject an interpretation which would sustain the latter view. To hold that the conversation of intimate friends may be reported, or the privacy of domestic circles invaded, to secure evidence of declarations, which, if subsequently communicated to the person to whom they relate, may, in the opinion of a jury in the Police Court, "have a tendency" to induce him to commit a breach of the peace, would recognize and encourage a system of espionage abhorrent to American ideas, and productive of more evil than the practice condemned. Such evidence necessarily would be of the dubious character of which Mr. Greenleaf speaks in his treatise on "Evidence." All that he says of oral admissions is applicable to the repetition of what one may "utter to or in the presence of another"; especially in the absence of the person spoken of. "With respect to all verbal admissions, it may be observed that they ought to be received with great caution. The evidence, consisting as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake, the party himself either * * * not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say." (Greenl. Ev. § 200.)

Such an interpretation of the orders would revive a kind of judicial investigation for which there have been no precedents in this country, and none in England since the reign of Edward the Fourth, when a citizen of London was hanged, who had said he would make his son an heir of the "crown," the sign of the house in which he lived; and a gentleman, whose favorite buck the king had killed in hunting, was decapitated because he had wished it, horns and all, in his belly, that counseled the king to it. (1 Hale's P. C. 115.) To say that a prosecution, such as has been mentioned, may be maintained by virtue of an ordinance, the sole authority to pass which is found in the city charter above cited, by which the Supervisors are empowered to "regulate all occupations, * * * exhibitions, and practices which are against good morals, contrary to public order, or dan-

gerous to the public safety," is to declare a doctrine which, if not subversive of constitutional principles, is apparently violative of established rules relating to municipal legislation.

Municipal by-laws must harmonize with the general laws of the State, with the municipal charter, and with the principles of the common law. (14 Barb. 478; 4 Hill, 209.) They must also be reasonable, and whenever they appear not to be, the Courts will, as matter of law, declare them void. (2 Kyd on Corp. 107.) We have no space to amplify the suggestion, but there is at least grave doubt whether an ordinance which provides a punishment of six months' imprisonment and $1,000 fine as the penalty for incautious words spoken of an absent person, at the breakfast table, (which may arbitrarily be considered by a jury as having a tendency to create a breach of the peace) would be "reasonable," or held to be authorized under a general grant of power to the Supervisors to prohibit or regulate practices "against good morals, or contrary to public order, or dangerous to the public peace." That such an ordinance would not accord with our governing policy is further evidenced, perhaps, by the circumstance that no like prohibitory legislation has ever been attempted in this or other States.

We have assumed, for the purpose of this decision, (although the contrary course, the precise objection not being made, has been repeatedly pursued by the Court, as also in the United States Courts—notably in Parrott's and other recent cases) that the invalidity of the Orders 197 and 1,196 ought not to be determined in this proceeding, and made the ground for petitioner's discharge. We have assumed—for the purposes of this decision only—that here, on *habeas corpus*, the Police Court will be presumed to have adjudged the order valid, and that its judgment in that regard is to be treated as final. But in ascertaining the meaning of the portion of the Order 1,196, on which the judgment against the petitioner is based, we may very properly consider the circumstance, that if the language, supposing it be ambiguous, be construed in one way, it does not necessarily conflict with the municipal charter or with the common or statutory law; while, if it be construed in another manner, it is either clearly repugnant to all these, or leaves the judicial mind with grave doubts whether it contravenes State legislation, or im-

pinges upon the due enjoyment of constitutional and legal rights. It is the ordinance properly construed which the Police Court has adjudged to be valid.

We have so far considered subdivision 3 of § 28 as if its language would admit of two interpretations. But we are unable to discover any ambiguity in it. It declares, no person shall "address to another, or utter in the presence of another, any words * * * having a tendency to create a breach of the peace." If the second clause of the sentence had been omitted, and the subdivision had read, "address to another any words * * * having a tendency," etc., could anybody have doubted what it was intended to prohibit? There could have been no hesitation in declaring that the words must be such as to have a tendency to produce a breach of the peace on the part of the person to whom they are addressed. There is nothing in the language, "or utter in the presence of another," which can enlarge the scope of the intended prohibition. "No person shall address to or utter in the presence of another person words having a tendency to induce such other person to commit a breach of the peace." Is not this a simple paraphrase of the language of the ordinance? Either this truly represents the meaning, or, as we have seen, the subdivision prohibits the utterance of words which can be construed as having a certain tendency—in private, to the smallest audience, and in the absence of the only person who would have reason to be offended by them—a construction which might be supposed grievously to interfere with the inalienable privileges of certain coteries. It is certain that the ordinance does not require that more than two persons should be present when the words are spoken. If it had been intended to punish the denunciation of absent individuals at public assemblages, it would seem that language would have been employed somewhat like that of the Act of January 19th, 1878, (which was repealed at the next session of the Legislature): "Any person who, in the presence of twenty-five or more persons, shall utter any language with intent to incite * * * to any acts of violence," etc. Certainly, if the purpose had been to prevent appeals to a riotous mob, such as were calculated not only to incite those present to violence, but also to lead to breaches of the peace on the part of absent persons de-

nounced, it would not have been difficult to find apt and fitting words to express that purpose. For actual riotous conduct the remedy is the strong arm of the government efficiently wielded, as we have no doubt it will be if the occasion arises, by the executive power. But the purpose of the third subdivision of § 29 of Order 1,196 is less comprehensive, and seems very apparent. The law has always given weight to the provocation which leads to an assault; insulting words and conduct in the presence of the assailant may sometimes reduce the degree of his crime, and may always be considered in mitigation of punishment.

The portion of the ordinance so often referred to provides a penalty for him who shall provoke an assault upon himself "by addressing to another person, or uttering in the presence of another person, words * * * having a tendency to create a breach of the peace."

The judgment of the Police Court, separate from the extraneous recitals which constitute no part of it, is simply, "It is ordered and adjudged that * * Denis Kearny pay a fine of $1,000, and be imprisoned in the House of Correction of the city and county for six months." Does the record of the proceedings of the Police Court show that the Court had jurisdiction to render this judgment? The case is unembarrassed by another question, since no oral evidence was offered to establish that he was in fact tried and convicted for the commission of any act other than that charged in the complaint, nor is there any entry in the minutes of the proceedings, in any degree, looking toward a prosecution for the commission of any other act. The complaint charges, that at a certain date, in San Francisco, the petitioner "did willfully and unlawfully utter and address to others, to wit, to a large number of persons then and there assembled, to wit, 100 and more persons whose names are unknown to deponent, certain profane words and language, which words and language then and there had a tendency to create a breach of the peace." Then follows a recital of the words alleged to have been spoken. There is no averment that the words were "addressed to or uttered in the presence of" the person of whom they were spoken. But that the words are addressed to or uttered in the presence of the person with respect to whom they

are spoken, constitutes, as we have seen, the very gist of the offense created by the third subdivision of § 28 of chapter 3, of the city charter. Unless we adopt the construction of the language of subdivision 3 which we have already rejected, however reprehensible the alleged action of petitioner, he did not commit the particular crime there defined—though he uttered the words in the presence of any number of persons other than him of whom he spoke.

This is not the case of a complaint inartificially drawn, which intimates the existence of the facts necessary to the constitution of the offense, or even of an attempted statement, insufficient, but indicating a purpose to declare on the essential facts. It is a total failure to allege any cause of action, and, however objectionable the conduct imputed to the petitioner, he is no more, in the eye of the law, charged by the complaint with any crime, than if the paper had ascribed to him the most innocent of deeds. If Denis Kearny was legally convicted under the ordinance by reason of his denunciation of a person in his absence, then each one of those who have employed similar (though sometimes less profane) language in respect to Denis Kearny, he not being present, may be imprisoned and fined by the Police Court.

It would seem that criminal actions in the Police Court must be commenced by complaint in writing, (Penal Code, § 1426) and that the Court is required to keep a docket in which must be entered each action and the proceedings therein. (Penal Code, § 1428.) As to the jurisdictional facts which the law directs to be set forth on the records of that Court, they must be apparent on the face of the proceedings, or its judgment is void. (*Jolley* v. *Foltz*, 34 Cal. 321.) If, however, it should even be admitted that it might be established by proof *aliunde* that the petitioner was tried and convicted of an offense of which the inferior court had jurisdiction, no evidence of any kind to establish that fact has been produced.

Inasmuch as it affirmatively appears from the record of the proceedings that the petitioner was tried and sentenced to be punished for the commission of an act which is and under the existing laws can be no crime, the judgment of the Police Court

is absolutely void. The petitioner must, therefore, be discharged from custody.

It is so ordered.

McKEE, J., SHARPSTEIN, J., and ROSS, J., concurred.

THORNTON, J., concurring:

I concur in the reasoning and the result reached in the opinion signed by my brethren, McKINSTRY and others. In doing so I desire to add that I do not wish to be considered as concluded by anything contained in that opinion, as to a judgment or sentence of any court of criminal jurisdiction known to the Constitution and laws of this State. I am strongly inclined to the opinion that the same result must be reached upon a so-called judgment of any of the Superior Courts, when there is nothing in the shape of law to maintain the judgment. It must be remembered that we have no criminal common law. All our public offenses or crimes are statutory. Unless a statute exists making an act a crime or a public offense, (see Penal Code, § 6) no one can be adjudged to suffer punishment for the commission of it, however heinous it may be when tested according to the ordinary criterion of public duty or public obligation. To hold that any court of criminal jurisdiction can adjudge an act, not a public offense by statute, deserving of punishment and sentence, and commit to prison or fine for the commission of such an act, which, in such a condition of the law, is innocent, and that the person so sentenced could not be relieved from it on *habeas corpus*, would be, it seems to me, to hold that the court is invested not only with judicial, but with legislative power—that the court can make the law, create the offense, and adjudge a prisoner guilty of having committed it. The court in such a case would have no jurisdiction; as was said by the learned Judge who wrote the opinion in Corryell's case (22 Cal. p. 181): "The court derives its jurisdiction from the law, and its jurisdiction extends to such matters as the law declares criminal, and none other, and when it undertakes to imprison for an offense to which no criminality is attached, it acts beyond its jurisdiction." Such cases, it is evident, must be of rare occurrence. They are the offspring of peculiar circumstances, which happen infre-

quently. When they do occur, and are presented for adjudication, should not the court be as ready in such emergencies to relieve on *habeas corpus* as to enforce the legal punishment in case of guilt?" (See *People* v. *Liscomb*, 60 N. Y. 569, 570.) I fail to see that any serious consequences can flow from such a use of the writ of *habeas corpus*, unless an injury can result from the enlargement of an innocent person, whom some court has, by grievous mistake and illegal sentence, adjudged to suffer confinement in prison.

However, the question is not before us for decision, and these few observations are intended to preclude a conclusion which might possibly be drawn from the opinion of the Court, and to state the point without deciding it.

MYRICK, J.: I find myself unable to concur in the conclusions reached by my associates.

MORRISON, C. J.: I dissent.

[No. 10,492.—Department No. 2.]

PEOPLE *v.* JOSE MARIA ALVISO AND PACHECO ALVISO.

MURDER—INDICTMENT.—An indictment for murder, which charged that defendants "did feloniously, and unlawfully, and of their malice aforethought, kill and murder J. R., contrary," etc., *held* to be good.

ID.—SEPARATE TRIAL—DISCRETION OF THE COURT.—The defendants in open court waived a separate trial, but afterward, before the jury was sworn, moved for a separate trial. *Held*, that it was in the discretion of the Court to refuse the application.

ID.—PRACTICE—BILL OF PARTICULARS.—The defendant is not entitled to a bill of particulars of the evidence relied upon to sustain the indictment.

ID.—WITNESS—EVIDENCE.—A woman, who is living with the defendant as his wife, but not married to him, is a competent witness against him.

ID.—EVIDENCE.—Upon the trial of an indictment for murder, upon the question as to whether the place of the killing was within five hundred yards of the boundary-line of the county of the indictment, the estimate of a witness who had been upon the ground, but who had not actually measured the distance, was admitted. *Held*, not to be error.

ID.—CORPUS DELICTI.—It is very seldom that a conviction occurs without a direct proof of the *corpus delicti*, either by eye-witnesses of the homicide, or the subsequent discovery of the body; yet there may be exceptions, as where the body has been consumed by fire, or boiled in potash, or dissolved

by acids, rendering it impossible that it should ever be produced, and in such cases the *corpus delicti* may be proved circumstantially or inferentially. *Held*, accordingly, in this case, upon the evidence stated by the Court, that the *corpus delicti* was sufficiently proved.

APPEAL from a judgment of conviction, in the Twentieth District Court, County of Monterey, and from an order denying a new trial, in the Superior Court of the same county. BELDEN, J.

The facts are stated in the opinion.

Gregory & Shipsey, for Appellants.

Attorney-General, for Respondent.

MYRICK, J.:

The defendants were indicted for the murder of John Ruhland. The indictment charges that on a day named, at the County of Monterey, the defendants "did feloniously and unlawfully, and of their malice aforethought, kill and murder one John Ruhland, contrary," etc. The defendants demurred to the indictment, on the grounds that the facts stated do not constitute a public offense; that it does not contain a statement of the acts constituting the offense charged in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and that it is not certain and direct as regards the offense charged, nor the particular circumstances of the offense. The Court overruled the demurrer, and such ruling is assigned as error; counsel admitting that the decisions would sustain the indictment, but urging a reconsideration of the rules established. We are satisfied that the decisions are correct on principle, and that the Court below did not err in the ruling.

After the defendants had pleaded not guilty, the case was set down for trial, and the defendants in open court waived a separate trial. At the request of defendants' counsel the jury was drawn, selected, and accepted. On the following day, before the jury was sworn, defendants moved the Court for a separate trial, which motion was denied; and this is alleged as error. After defendants have expressly waived a separate trial, we see

no error in refusing their application therefor; it was, at most, a matter of discretion, and there was no abuse of discretion, in denying the motion.

Before the commencement of the trial, the defendants moved the Court that the prosecution be ordered to furnish to the defendants a bill of particulars of the evidence relied on to support the indictment, on the ground that they were informed that the indictment was found on the testimony of one Eulario Martinez, whose name was indorsed on the indictment, who testified to the killing on a certain day, and at a certain place, and that they are informed that the prosecution may abandon the testimony of Martinez, and attempt to prove by one Juan Valdez that deceased was killed at another time, at a different place, and under different circumstances; and that, by reason of such conflicting information, and of the generality of the indictment, the defendants did not know what case they were to meet. The denial of the motion by the Court is assigned as error. Our attention has not been directed to any section of the Penal Code directing a bill of particulars to be furnished to a defendant on trial upon a criminal charge, and we do not call to mind any rule of law requiring the same to be done. We see no error in the ruling.

One Rosa Smith was offered as a witness for the prosecution, and was sworn and examined, notwithstanding the objection of defendants. On being examined as to her competency as a witness, she testified: "I have three children by the defendant, Pacheco Alviso. I have been living with him as his wife about seven years. In the community where we live we have passed, and recognized each other, as husband and wife. We have not been received as husband and wife by our neighbors. We have been well received by them. In February last I lived with Pacheco Alviso as his wife, and he with me as my husband. Our neighbors have regarded us as living together without being married, but they have received us well. We have had no relations with respectable married people. We were not married by the church or by the law." The objection, that she was the wife of the defendant, Pacheco Alviso, and could not be sworn as a witness, was overruled by the Court. We see no error in this ruling. The relation of husband and wife did not exist between the witness and Pacheco.

An objection was made that the alleged killing was not in Monterey County, nor within 500 yards of the line between that county and San Benito County. That question was fully submitted to the jury, (§ 782 Pen. Code) and the verdict is conclusive, the evidence being conflicting. An objection was made to the testimony of a witness, a county surveyor, who had not actually measured the distance from the county line, but who had been upon the ground, and was asked to give his estimate of the distance. The objection was overruled by the Court. There was no error in the ruling. To hold it to be error would be to hold that no estimate of any distance, even the width of a road, or the size of a room, could be given, unless the witness had gone over the space with chain or rule.

The next point for consideration relates to the *corpus delicti*. The defendants urge that this has not been shown; that the body of deceased not having been discovered, an essential fact in any charge of murder, viz., death, has not been established. In establishing a charge of murder, two facts are essential to a conviction, viz., the death of the alleged victim, and the existence of criminal agency as the cause.

It is very seldom that a conviction occurs without positive proof of the former, either by eye-witnesses of the homicide, or the subsequent discovery of the body; and while the general rule is clearly laid down, yet the authorities concede that there may be exceptions. Thus, Wharton, in his work on Homicide, § 637, relates instances of the human body being disposed of by fire, or boiled in potash, or dissolved by acids, rendering it impossible that it should ever be produced; and concludes: "It is clear that in such cases the *corpus delicti* may be proved circumstantially or inferentially."

In the case at bar, the evidence offered by the prosecution tended to establish the following facts:

In February, 1879, John Ruhland, a German, (familiarly known as Dutch John) lived in a small cabin in the Gabilan Mountains, near the line between Monterey and San Benito Counties. He owned some 500 sheep and 300 lambs. The only occupant of the cabin with Ruhland was an old man, a Mexican, named Juan Valdez. On a day in February, about the 11th or 12th, Valdez being alone at the cabin, the defend-

ants came there about noon. After remaining a short time, they saddled their horses and rode away. In the afternoon they returned, unsaddled their horses, and told Valdez, "Friend, gather your things up and leave immediately; we are taking a bad step within the last few days." Valdez was in the act of gathering up what he had, when they said: "Stop, John is coming." Ruhland arrived at the house as if going inside, but before he arrived at the door, José Maria (defendant) stopped him, with a pistol in his hand. José told Pacheco, (the other defendant) "Go and tie him." Pacheco tried to catch him, but he did not allow himself to be caught. Then, when Pacheco retired on one side, José Maria shot him, the ball taking effect in or on one side of the eye. Ruhland staggered and fell. He rose and was going inside the house, when José Maria shot him in the back. Pacheco then went to help Valdez catch his horse, and while they were thus engaged, Valdez heard a shot from the cabin. Pacheco said to Valdez: "Be in a hurry; catch your horse; don't be afraid, we are not going to hurt you; you are too old. God will kill you; but you must n't say anything, otherwise we will kill you." Valdez caught and saddled his horse, and rode away. Ruhland has not since been seen or heard of. Not far from the cabin was a large white-oak tree that had been cut down for some time. It was lying at a picket fence. It was a tall tree, and about ten feet from the but it branched in a fork. Neither the fence nor the tree were then at all burned. The day was dark and foggy. That afternoon, toward night, two boys, passing near by in hunting for a lost saddle, observed a fire not far from the cabin, and near by saw and recognized the defendants. Pacheco at that time was living with the woman Rosa Smith. The defendants left her house before noon, telling her that they were going to a dance in Chualar Cañon, and return next morning. Pacheco told the woman that they had brought some sheep; that Dutch John gave him the sheep to take care of for him. They left the sheep up the mountains. The defendants soon after sheared the sheep, and hauled the wool to Salinas, where they sold it through an employee, and received therefor $204.70. To some they said that they owned the sheep; to others, that they were caring for them for Ruhland. After receiving the

money, they divided it, Pacheco paying some bills of his own, and making purchases, and José Maria sending away $20, and losing $40 at cards. Pacheco was arrested in May, but was soon liberated. In a conversation with Rosa Smith, she asked him why he was arrested, and if it was true that they had found the dead body of Ruhland. He replied, that they could find nothing; that José Maria had killed him, and burned the body; that he, Pacheco, would n't help, and José Maria killed him. He was very down-hearted; said he was sick. He said that the killing and burning took place in February, at the time they said they were going to a party at Chualar Cañon; that the night of the fire he recognized the boys, Cipriano and Eulario, passing by. He said that, at the time Dutch John was killed, an old man was there, and José Maria wanted to kill him, but he, Pacheco, prevented it. Pacheco offered to sell some of the sheep, and gave away some. Search was made for Ruhland, but without avail. On examining the premises, the oak-tree was found to have been burned, also the branches, and several lengths of the picket fence, and some posts; the posts had been pulled up. Wire had been used on the fence; several pieces were found curled together where the fire had been. The ashes from the fire were not scattered, but lay in a body where the fork of the tree had been, and in the ashes were a few pieces of bones, too small to be identified as human bones. The defendants were indicted, and Pacheco arrested. Search was made for José Maria by a *posse*. They came upon him in the mountains. When he saw the men he fled. He was followed some three miles, and escaped, but was subsequently arrested.

After Pacheco was arrested, he was asked where Ruhland was when he sheared the sheep. He replied, at his house. He was asked where Ruhland was when he took the wool to Salinas and sold it. He replied, at his house; both of which statements were untrue.

The foregoing is a brief synopsis of the evidence given for the prosecution. It appears that this evidence tended to show that the defendants went to Ruhland's house for the purpose of killing him, and appropriating his sheep to their own use; that in pursuance of that object, one of them shot him at least twice, once in the head and once in the back, either of the shots being

likely to produce death; that Ruhland was never again seen or heard of; that that night, a dark one, they built a large fire, and that subsequently remnants of a few bones were found in the ashes; that the fire consumed the body of Ruhland; that the sheep were taken possession of by the defendants, the wool sold, and the proceeds applied to their own use.

This evidence being submitted to the jury, under proper instructions, was sufficient to establish the *corpus delicti*, viz., that Ruhland had come to his death, and by criminal agency. There was no error in the instructions given by the Court, nor in refusing the instructions asked for by defendants, which were refused.

Judgment and order affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 10,522.—Department No. 2.]

THE PEOPLE *v.* MITCHELL

INSTRUCTIONS—EVIDENCE—CONSTITUTIONAL LAW.—Upon the trial of an indictment for burglary, the Court instructed the jury that the possession of the property by the defendant recently after it had been stolen, unless satisfactorily accounted for by the defendant, raised a presumption of his guilt. *Held*, that the instruction was in violation of the constitutional provision, which prohibits the Court from charging the jury with reference to matters of fact.

APPEAL from a judgment of conviction, and from an order denying a new trial, in the Superior Court of Tehama County. LEWIS, J.

The facts are stated in the opinion.

J. F. Ellison, for Appellant.

Attorney-General, for Respondent.

MORRISON, C. J.:

This is an information for burglary, filed by the District Attorney of Tehama County, against the defendant and one George

Kane. The information charges "that Reuben J. Mitchell and George Kane, on or about the 4th day of March, 1880, at and in the County of Tehama, and State of California, did feloniously enter the meat-shop of George W. Vestal, with intent to commit petit larceny, contrary to the form, force, and effect of the statute," etc. Reuben J. Mitchell was convicted of the crime charged in the information, and from the judgment of conviction as well as from the order of the Court below denying his motion for a new trial, he brings this appeal. It will be necessary for this Court to pass upon only one error found in the transcript, as it is sufficient to make it our duty to reverse the judgment of the Superior Court.

The following instruction was given to the jury: "Proof of the possession of property in the hands of defendant recently after the same property was stolen out of the meat-shop of Vestal, unless the possession of the same is satisfactorily accounted for by the defendant, raises a presumption of guilt against the defendant." There was evidence in the case tending to show that the meat stolen from the shop of Vestal, or at least a portion of it, was found in the possession of the defendant Mitchell, very soon after the larceny was committed.

The question presented by the foregoing instruction was before the late Court in the case of the *People* v. *Walden*, 51 Cal. 588, and the Court there says: "The Court below charged the jury that possession by the defendant of the key unexplained raises a reasonable presumption that he had it for the purpose shown by the evidence it could be used for—or, in other words, if you believe it would open the clerk's office where these ballots were kept, then the possession by the defendant, unexplained, raises a reasonable presumption that he had it for the purpose of opening the door." The Court proceeds to say: "In no view can this charge be sustained. If it be said that it was an attempt to charge in respect to a legal presumption, it was clearly error, since no such presumption would arise from the fact stated, as a matter of law. If it was an attempt on the part of the Court to instruct the jury that the existence of one fact, in view of the ordinary experience of mankind and connection of events, must be presumed from the existence of another, this was an interference with what, as we have shown, is the

exclusive province of the jury. It was charging the jury with respect to matters of fact, and was a contravention of § 17, art. vi, of the Constitution of the State." Section 19, art. vii, of the present Constitution contains the same prohibition.

In the recent case of the *People* v. *Wong Ah Ngow*, 54 Cal. 151, this Court had occasion to pass upon an instruction similar to the one now under consideration. In that case, the Court below, employing the language found in Wharton's American Criminal Law, charged the jury that flight raised a *presumption* of guilt, and the judgment was reversed for error in the instruction. Flight was a circumstance which the jury might consider; but it was held error for the Court to charge the jury that flight *per se* raised a *presumption* of guilt. So, in this case, it would have been proper for the Court below to have instructed the jury, that the possession of stolen goods, recently after the larceny was committed, was a circumstance proper to be considered by them (*People* v. *Gill*, 45 Cal. 285); but to tell them that such possession raised a *presumption* of guilt, was in violation of the constitutional provision which prohibits the Court from charging the jury with respect to matters of fact.

For this error the judgment and order of the Court below are reversed, and the cause is remanded for a new trial.

MYRICK, J., and SHARPSTEIN, J., concurred.

[No. 6,404.—Department No. 1.]

PARKS *v.* BARNEY.

INSTRUCTIONS—JURY—TRIAL—SALE OF PERSONAL PROPERTY—FRAUD.—In an action for the recovery of personal property, in which the defendant justified the taking, as Sheriff, under an execution against the plaintiff's vendor, the Court instructed the jury that the evidence showed that there was no immediate delivery, nor any actual and continued change of possession under the alleged sale to the plaintiff, and therefore to find for the defendant. *Held*, that the circumstances appearing in the case might perhaps have justified the jury in the finding that there was fraud, or that there was no delivery, or actual or continued change of possession; but that the Court could not, in view of the testimony, say, *as a matter of law*, that the verdict should be for the defendant.

APPEAL from a judgment for the defendant, and from an order denying a new trial, in the Sixth District Court, County of Yolo. DENSON, J.

Lambert & Dewitt, and *J. C. Ball*, for Appellants.

The sale to the plaintiff was a legal and valid sale. The full value of the horses was paid for them, and the delivery was immediate, and the change of possession *actual and complete.* (*Stevens* v. *Irwin*, 15 Cal. 503; *Lay* v. *Neville*, 25 id. 545; *Godchaux* v. *Mulford*, 26 id. 316; *Ford* v. *Chambers*, 28 id. 13.)

The Court transcended its powers in instructing the jury to find for the defendant. (*Allen* v. *Hopman*, 2 Dana, 221; art. vi, § 17, Const.; Code Civ. Proc. § 2101; *Battersby* v. *Abbott*, 9 Cal. 565; *People* v. *Ybarra*, 17 id. 166; *Miller* v. *Stewart*, 24 id. 505; *Hodgkins* v. *Hook*, 23 id. 581; *Hart* v. *Miller*, 3 A. K. Marsh. 336; *Aylwin* v. *Ulmer*, 12 Mass. 22; *Utica Ins. Co.* v. *Badger*, 3 Wend. 102; *Fisher* v. *Duncan*, 1 Hen. & M. 563; *Trotter* v. *Sanders*, 7 J. J. Marsh. 321; *Hardaway* v. *Manson*, 2 Munf. 230.)

W. B. Treadwell, for Respondent.

The alleged sale was not accompanied by an immediate delivery, nor followed by an actual or continued change of possession. (Civ. Code, § 3440; *Engles* v. *Marshall*, 19 Cal. 320; *Vance* v. *Boynton*, 8 id. 554; *Woods* v. *Bugbey*, 29 id. 466;

Stevens v. *Irwin*, 15 id. 503; *Hurlburd* v. *Bogardus*, 10 id. 518; *Weil* v. *Paul*, 22 id. 492; *Malone* v. *Plato*, 22 id. 103; *Clow* v. *Woods*, 5 Serg. & R. 287; *Weeks* v. *Wead*, 2 Aik. 64; *The Romp*, Olcott, 203; *Mott* v. *McNiel*, 1 Aik. 165; *Norton* v. *Doolittle*, 32 Conn. 410; *Flanagin* v. *Wood*, 33 Vt. 340; *Patten* v. *Smith*, 5 Conn. 200; *Beattie* v. *Robin*, 2 Vt. 181; Smith's L. C. 33, *Twyne's Case*; Freeman on Ex. §§ 147–155.)

Under the evidence the Court was justified in taking the case from the jury. (*Engles* v. *Marshall*, 19 Cal. 320; *Mott* v. *McNiel*, 1 Aik. 165.)

Ross, J.:

This is an action to recover twenty head of horses, or the sum of one thousand dollars, their value. The defendant is the Sheriff of Yolo County, and took the property on the 10th of August, 1877, under and by virtue of an execution against one Lambert, and in favor of one Asberry. The plaintiff claimed title under an alleged sale from Lambert to him on the 23rd of July, 1877, which sale was claimed by the defendant to be void for want of an immediate delivery, or any actual or continued change of possession of the property.

On the trial, evidence was introduced tending to show this state of facts: Lambert, the former owner of the horses, was the owner of a farm in Yolo County, on which the horses were kept. Up to the 10th of May, 1877, he was living on the farm, and one Grum was working for him. About that time Lambert left the ranch, and did not live there afterward; but he and his sons continued to go there occasionally to look after the stock. Grum continued to make the ranch his headquarters, although he was absent from time to time. He testified at the trial that he did not work for Lambert after May 10th. The plaintiff, who resides in Napa County, testified that he went to Woodland, in Yolo County, on the 22nd of July, 1877, and purchased the horses from Lambert the next day, July 23rd, for $1,000, which he paid him; that they made the trade in the town of Woodland, and Lambert was to deliver him the horses at a butcher's corral, to which place Grum had, on the same day, by direction of Lambert, driven them from the ranch — the

corral being about a mile or a mile and a half from both the town and the ranch; that he and Lambert went to the corral, and there the latter, in the presence of Grum and De Witt, an attorney, delivered him the horses, together with a bill of sale, for which the witness paid him a thousand dollars in gold coin; and that he, plaintiff, then employed Grum to pasture the horses for him at the rate of $2.50 a head per month on Lambert's ranch, a lease of which Grum had on the same day taken from Lambert. Grum testified that he received the horses at the corral from plaintiff, for the purpose of pasturage, upon the terms stated, and that he, on the same day, drove them back to the ranch, where he kept them for plaintiff until the 10th of August, on which day they were levied on by defendant. It also appeared from the plaintiff's testimony that the money with which he made the purchase was borrowed by him after his arrival in Woodland from one Viers, a son-in-law of Lambert, and that plaintiff did not go to look at the horses before agreeing to purchase them. It appeared, however, that he knew the horses, having at one time kept them on his own ranch in Napa County. The case was tried in the Court below with a jury, and, at the close of the testimony, the Court, at the request of the defendant, instructed the jury as follows: "The jury are instructed that in this case the evidence shows that there was no immediate delivery of the property in controversy, nor any actual and continued change of possession of the same, under the alleged sale from Lambert to the plaintiff. You will, therefore, find a verdict for the defendant." The instruction was duly excepted to. The jury retired, and after deliberation, were unable to agree. Returning into court, they inquired whether they were bound to find and return a verdict as directed in the said instruction, and being informed that they must obey the instruction as given them by the Court, and that if they refused to do so they would be in contempt of court and subject to a fine, they returned a verdict for the defendant.

The instruction was clearly erroneous. If it was true that at the time of the alleged sale, and prior thereto, Grum was not in the employ of Lambert, and that the latter had in good faith leased the ranch to Grum, and that the plaintiff in good

faith bought the horses from Lambert, the delivery of the horses at the corral, and the subsequent employment of Grum by plaintiff to pasture them, and Grum's actual possession of them for that purpose, would have been such evidence of a delivery and actual and continued change of possession, as might have justified the jury in finding a verdict for the plaintiff. The truth or falsity of the testimony, and the *bona fides* of the transaction, were questions for them to pass upon. The circumstances appearing in this case might perhaps have been sufficient to justify the jury, or the Court, if it had been sitting as a jury, to find *from the evidence* that there was fraud in the transaction, or that there was in fact no delivery, or no actual or continued change of possession. But the Court could not, in view of the testimony, say as a *matter of law* that the verdict must be for the defendant.

The appeal from the judgment having been taken too late, must be dismissed.

Appeal from judgment dismissed. Order denying a new trial reversed, and cause remanded for a new trial.

McKINSTRY, J., and McKEE, J., concurred.

[No. 7,213.—In Bank.]

DESMOND *v.* DUNN.

MUNICIPAL CORPORATIONS — CONSTITUTIONAL LAW — CONSTRUCTION OF THE CONSTITUTION.—Under § 6, art. xi, of the Constitution, cities and counties previously incorporated are subject to or controlled by general laws enacted under the Constitution for the organizations of such governments, but the charters of such cities and towns remain in force in each case, until a majority of the electors of the corporation determine to become organized under general laws, or to frame a charter for their own government.

ID.—ID.—ID.—CONSOLIDATED CITY AND COUNTY GOVERNMENTS — SAN FRANCISCO — THE MCCLURE CHARTER.—By § 7 of the same article the provisions of the Constitution applicable to cities apply also to consolidated city and county governments, and, therefore, the act known as the McClure Charter, even if constitutional, does not apply to the corporation known as the City and County of San Francisco, until a majority of the electors of the corporation, voting at a general election, shall so determine.

ID.—ID.—ID.—ID.—ID.—ID.—The provision of § 7 of the same article: that "In consolidated city and county governments of more than one hundred thousand inhabitants there shall be two Boards of Supervisors, or Houses of Legislation," has reference to general laws or charters for the government of

such corporations passed subsequently to the adoption of the Constitution; and, therefore, the act of incorporation of the City and County of San Francisco, known as the Consolidation Act, is not in conflict with the provisions of the Constitution, and remains in force by virtue of the first clause of § 1 of the schedule to the Constitution.

ID.—ID.—ID.—ID.—ID.—ID.—GENERAL LAWS — DEFINITION.—Sections 6 and 7 of art. xi of the Constitution evidently contemplated the enactment of general laws providing for *all* corporations for municipal purposes, and not for *some* only; and such laws must be as general as the subject to which they relate. The McClure Charter is, therefore, unconstitutional: 1st. Because it excludes from its operation all municipal corporations, except consolidated city and county governments; and secondly, because it is also limited to municipal corporations having more than one hundred thousand inhabitants, and makes no provision for those having less than that population.

ID.—ID.—ID.—GENERAL LAW — CLASSIFICATION — DEFINITION.— The classification provided for in § 6, art. xi of the Constitution, is one that will include all cities and towns. The act in question, therefore, does not comply with this provision.

APPLICATION for writ of *mandamus*.

The facts are stated in the opinion.

A. G. Platt, for Plaintiff.

The act in question is a general law, as it refers to a class, to wit, "all over one hundred thousand in population." A general law is one that refers to persons and things *as a class*. (*State* v. *Parsons*, 1 N. J. Law Journ. 83; *Kilgore* v. *Magee*, 85 Pa. St. 411; *Wheeler* v. *Philadelphia*, 77 id. 349; *Commonwealth* v. *Patton*, 88 id. 260; *Haskel* v. *City of Burlington*, 30 Iowa, 236; *Walker* v. *Potter*, 10 Ohio St. 85; *Gentile* v. *The State*, 29 Ind. 411; *McAunich* v. *Miss. & Mo. R. R. Co.* 20 Iowa, 343.)

This is a consolidated city and county government. The city and county governments are merged into a new and entirely distinct government—one that is neither a city nor a county. A classification of *cities* would not then apply to consolidated governments. The act in question does this by providing for "merged and consolidated cities and counties of more than one hundred thousand inhabitants." This is a classification, and is recognized in § 7, art. xi, of the Constitution.

It is not necessary that this act be submitted to the electors of the city and county to be adopted by them. The Legisla-

ture has power to create, amend, destroy, and control municipal corporations. It may impose upon them charters, and it need not obtain the consent of the people to be affected. (Dillon on Mun. Corp. §§ 18, 23, 30, and 38.) This power exists unless there is an express inhibition in the Constitution.

Section 6, art. xi, of the Constitution, provides that "all cities or towns *heretofore* or hereafter organized, and all charters thereof framed or adopted by authority of the Constitution *shall be subject to and controlled by general laws.*" What becomes, then, of their right of election in the matter?

The provision in § 6, art. xi, that "cities and towns heretofore organized * * * may become organized under such general laws, etc.," must be construed as giving the right of election only to corporations whose charters are not inconsistent with the Constitution; otherwise, if the former organization is under an organic law inconsistent with the Constitution, it must cease on the 1st day of July, 1880. (§ 1, art. xxii, Const.)

The present Consolidation Act provides only for one Board of Supervisors, and is, therefore, in conflict with § 7, art. xi, of the Constitution, which provides that in consolidated cities and counties having over one hundred thousand inhabitants there shall be two. This provision is *mandatory*. (§ 1, art. xxii, Const.; Cooley on Const. Lim. 78, 79, 140, 150; *State* v. *Maynard*, 14 Ill. 421; 21 N. Y. 12; Report of Const. Conv. 112th day.) The *Consolidation Act* is, therefore, in a most material part unconstitutional, and on the 1st of July must pass out of existence. The Court must consider such result in construing the Constitution.

Greathouse & Blanding, and *W. T. Baggett*, for Defendant.

The provisions of the McClure Charter are not applicable to the City and County of San Francisco.

Under § 6, art. xi of the Constitution, "Cities heretofore incorporated may organize under general laws *whenever a majority of electors, voting at a general election, shall so determine.*" It is claimed by the plaintiff, that the provision does not apply to the City and County of San Francisco. But this is no longer an open question in this State. (*McDonald* v. *Patterson*,

54 Cal. 245.) We therefore conclude that the city government will continue as at present, until a majority of electors shall determine to organize under a general law, or until a freeholders' charter is ratified by the Legislature.

It is claimed that § 7 provides for two Boards of Supervisors or Houses of Legislation, and that unless the McClure Charter be held applicable, there will be no legislative department for this city and county. We think it clear that all the provisions of § 7 were intended to apply only to corporations which might thereafter be organized.

The act is unconstitutional. It is special and local, in that it makes a classification repugnant to the Constitution. (Const. § 6, art. xi.) Instead of making a general classification by population, it is in terms limited: 1st, to merged and consolidated governments; and 2nd, to such merged and consolidated governments as contain more than one hundred thousand inhabitants. We think no classification could be made except by population, and that this should be general, and embrace all cities and towns.

San Francisco is the only city and county in the State which comes within the class. Wherever a class is made which, though general in its terms, is intended to apply, and in fact applies, only to one locality, the law is special and local, and therefore repugnant to the Constitution respecting special and local laws. (*State* v. *Mitchell*, 31 Ohio St. 607; *Devine* v. *Comm'rs of Cook Co.* 84 Ill. 592; *Com.* v. *Patton*, 88 Penn. St. 258.)

Independent of the classification, many, or we may say all, the provisions of the act are intended to apply, and in fact are applicable, only to the city of San Francisco, and the act is as much special and local as if the corporate name was written therein. (*People* v. *Cooper*, 83 Ill. 591; *People* v. *Allen*, 42 N. Y. 412, 416; *People* v. *Board of Ed. etc.* 13 Barb. 400–1; *People* v. *Albertion*, 55 N. Y. 50; *Atkinson* v. *R. R. Co.* 15 Ohio St. 35; *Ho Ah Kow* v. *Nunan*, 3 P. C. L. J. 413.)

SHARPSTEIN, J.:

The plaintiff alleges that on the 1st day of June, 1880, he presented to the defendant, who then was, and still is, the

Auditor of the City and County of San Francisco, for allowance, a demand on the treasury of said city and county, which it was the duty of said Auditor to allow, under an act of the Legislature, entitled, "An Act to provide for the organization, incorporation, and government of merged and consolidated cities and counties of more than one hundred thousand population, pursuant to the provisions of § 7, art. xi, of the Constitution of this State. Approved April 24th, 1880." The defendant refused to allow said demand, and the plaintiff applied for and obtained from this Court an alternative writ of *mandamus* to the defendant, requiring him to allow said demand, or to show cause for not doing so. The defendant answered by alleging that the act under which the plaintiff presented his demand for allowance is unconstitutional, and that it was not the duty of defendant, as Auditor aforesaid, to allow any claim or demand thereunder.

The act in question is commonly known as the "McClure Charter," and it will be so designated in this opinion. Although there is but one section of that charter which purports to be in force at this time, we shall base our decision upon grounds which will apply to the entire act. If § 5 is unconstitutional or inoperative, it is so by reason of the whole act being so.

The first question which we shall consider is this: If the McClure Charter be constitutional, can it have any force or effect within a municipal corporation which was incorporated prior to the adoption of the Constitution, until a majority of the electors of such corporation vote to accept or organize under it? Section 6 of art. xi provides that "cities and towns heretofore organized or incorporated may become organized under general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws." Both of these clauses plainly refer to charters which may be framed by authority of the present Constitution, and the latter clause is expressly limited to charters so framed. Neither applies to charters which existed before the adoption of the present Constitution. All such charters must remain in force until superseded or changed in the mode prescribed by the Constitution.

In the absence of any positive provision to the contrary, this is necessarily implied. These are the only provisions which are expressly made applicable to cities incorporated previously to the adoption of the Constitution; and the first expressly provides that any of such cities may become organized under general laws whenever a majority of the electors of such city shall so determine; and the other, that any charter framed or adopted under the present Constitution shall be subject to and controlled by general laws. But charters not framed or adopted by authority of said Constitution, need not be subject to or controlled by general laws. Therefore, the charter of the City and County of San Francisco, which antedates the present Constitution, and was not framed or adopted by authority of it, is not subject to or controlled by general laws. From which it follows, that if the McClure Charter falls within the term "general laws," it cannot have any force or effect within the City and County of San Francisco, until a majority of the electors thereof so determine in the manner provided in the Constitution, unless there be some other provision of the Constitution which gives force and effect to said charter, without such determination of a majority of the electors.

As these two clauses are the only ones which expressly refer to cities which had charters before and at the time of the adoption of the Constitution, and as many of the other provisions of the Constitution unmistakably refer to charters to be framed or adopted after the adoption of the Constitution, it is clearly our duty, upon well-established principles of construction, to hold that any general provisions which seem to conflict with these special provisions, were intended to apply to charters framed subsequently to the adoption of the Constitution. (Dwarris on Statutes, 765; Cooley's Const. Lim. 63; *Commonwealth* v. *The Council of Montrose*, 52 Pa. St. 391; *Wise* v. *Button*, 25 Wis. 109.)

To the foregoing views, one objection is raised, which is not wholly devoid of plausibility. It is, that the cities mentioned in § 6 are corporations other than consolidated cities and counties, and that, therefore, the provisions of that section do not apply to the City and County of San Francisco. It seems to us, however, that there is a clause in § 7 which wholly obviates

this objection. It reads as follows: "The provisions of this Constitution, applicable to cities, and also those applicable to counties, so far as not inconsistent or not prohibited to cities, shall be applicable to such consolidated governments." The meaning of this plainly is, that all the provisions of the Constitution applicable to cities shall be applicable to consolidated governments; and all the provisions applicable to counties shall also be applicable to such consolidated governments, except such as are inconsistent with the provisions of the Constitution applicable to cities or prohibited to cities; which indubitably makes all the provisions of the Constitution which are applicable to cities likewise applicable to consolidated governments, although provisions applicable to counties may also be applicable to such consolidated governments, if not inconsistent with the provisions of the Constitution applicable to cities, or prohibited by it to them. This strikes us as being such a complete answer to the objection above stated, as to render it unnecessary to suggest any other.

Our first conclusion, therefore, is, that the McClure Charter, if constitutional, cannot take effect as to the corporation known as the City and County of San Francisco, until a majority of the electors of said corporation, voting at a general election, shall so determine.

On the argument, it was insisted that the consequence of this would be to leave said city and county without any government after the first of next month. This suggestion would be entitled to some weight if the language of the Constitution on this point were so ambiguous as to leave room for doubt as to the intention of its framers. In the absence of any such doubt, however, our decision upon the proper construction of the Constitution cannot be influenced by what may be the consequences of a proper construction. But there is no ground for any alarm. Impliedly the Constitution provides that cities, incorporated previously to its adoption, shall continue to exist under their existing acts of incorporation, until a majority of the electors determine to be organized under general laws, or frame a charter for their own government. The argument that the existing charter must cease after the first of next month, because it is inconsistent with the clause of § 7 of the Constitution, which provides, that

"in consolidated city and county governments of more than one hundred thousand population there shall be two Boards of Supervisors, or Houses of Legislation," is based upon what we conceive to be a very narrow view of the provisions of the Constitution; because, if the Constitution has provided, as we think it has, by necessary implication, that the present charter shall remain in force and effect until superseded or supplanted by one framed and adopted in accordance with the provisions of the Constitution, then no provision of the present charter can be justly said to be inconsistent with any provision of the Constitution. The clause relating to two Boards, or Houses of Legislation, has reference to general laws passed or charters framed for the government of cities subsequently to the adoption of the Constitution. Otherwise, cities previously incorporated might, by the neglect of the Legislature to pass general laws, or of the people to frame charters for their government, be left without any governments after the first of next month. If the existing governments of cities, or of consolidated cities and counties, expire on the first of July, 1880, the framers of the Constitution could not have overlooked the contingency which might arise, by which such municipalities would be wholly without governments after that date. And if they foresaw it, as they must have foreseen it, if it can arise, they would have provided against it. We certainly could not, upon a clause of doubtful meaning, hold that the Convention intentionally or heedlessly paved the way for the introduction of "disorganization and chaos"; or that it intended to deprive any municipality of all government, unless such municipality should frame a charter for its own government, or organize under general laws, which might be obnoxious to a majority of its electors, within an unreasonably short period. "When the Legislature means to invade previously invested rights, to disregard the public interest, and endanger the peace of the commonwealth, its intention must be expressed in terms free from all ambiguity." (*Packer* v. *S. & E. R. Co.* 19 Pa. St. 211.)

The conclusion at which we have arrived is, that the act of incorporation of the City and County of San Francisco, commonly known as "The Consolidation Act," is within the first, and not within the last clause of § 1 of the Schedule to the

Constitution. And we base this conclusion upon what we conceive to have been the intention of the framers of the Constitution, as we gather it from the language of the instrument itself. To us the general intention to emancipate municipalities, as far as it consistently could be done, from the control of the Legislature, is apparent; and we cannot hold that general laws for the government of such municipalities can take effect in any of them, until a majority of the electors so determine, without violating not only the spirit, but likewise the plain letter of the Constitution. The intention being clear, it is our duty to give effect to it.

But it is claimed on behalf of the defendant that the act is unconstitutional. The importance of having that question determined is not wholly obviated by the conclusion above announced. Is the act known as "The McClure Charter" a general law, or does it fall within the definition of "general laws," as that term is used in the Constitution? By the terms of the act itself, it is limited in its operation to consolidated cities and counties of more than 100,000 population. Any city and county government of more than 100,000 population heretofore merged, consolidated, incorporated, and organized, or which may hereafter become so, must be organized, incorporated, and governed by and under "The McClure Charter," if it be constitutional. Does this act fulfill the requirement of § 7, art. xi, of the Constitution, that such consolidated governments "may be incorporated under general laws providing for the incorporation and organization of corporations for municipal purposes"? Is this a general law, "providing for the incorporation and organization of corporations for municipal purposes"? It does not purport to be. By its very terms, it excludes from its operation all "corporations for municipal purposes," except those which may be composed of cities and counties, merged or consolidated into one government. That this is in direct contravention of the Constitution does not admit of any doubt; and for the purpose of arriving at the intention of the framers of the instrument, §§ 6 and 7 of art. xi must be read together. The former provides that "corporations for municipal purposes shall not be created by special laws; but the Legislature, by general laws, shall provide for the incorpo-

ration, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed." Then follows the clause in which provision is made for cities, etc., previously organized.

The obvious meaning of the first two clauses of § 7 is, that the city and county governments may be merged and consolidated into one municipal government, and may be incorporated under general laws providing for the incorporation and organization of corporations for municipal purposes. All the provisions of the Constitution applicable to cities are applicable to such consolidated governments; and all the provisions applicable to counties, which are not inconsistent with the provisions of the Constitution applicable to cities, or prohibited to them, are likewise applicable to such consolidated governments. This evidently contemplates the enactment of general laws providing for the incorporation and organization of all corporations for municipal purposes, and not for the incorporation and organization of *some* corporations for municipal purposes. And city and county governments, when merged, etc., may not be incorporated under general laws providing for the incorporation of *consolidated* city and county governments, for municipal purposes, but under general laws providing for the incorporation and organization of *all* corporations for municipal purposes. How far this act falls short of that requirement can be seen at a glance. (84 Ill. 590; 83 id. 585; 82 id. 472.)

It is urged that the Legislature had the power to classify cities and towns in proportion to population, and that the laws enacted for the government of any one class would be general. But we look in vain in this act, and our attention has not been directed to any other, for the classification of cities and towns in proportion to population. That classification cannot be made on any other basis than that of population. And for the purposes of classification no distinction can be made between a corporation consisting of a simple city and one consisting of a city and county merged into one government, if the population in each is the same. Therefore, the act, which expressly applies to the latter only, does not apply to a class, and is not general, even in the sense contended for.

The act under consideration is not only limited to municipal

corporations of more than one hundred thousand inhabitants, but also to those composed of *cities and counties* containing that population. The Constitution nowhere confers the power to classify in that manner. A city, pure and simple, of more than one hundred thousand inhabitants, could not become organized and incorporated under this act; and yet it is expressly provided that cities shall be classified in proportion to population, and that the provisions of the Constitution applicable to cities shall be applicable to consolidated cities and counties, and that the latter "may be incorporated under general laws providing for the incorporation and organization of corporations for municipal purposes," but impliedly not otherwise.

With these provisions before us, it would be manifestly absurd to hold that a consolidated city and county could be incorporated under a "general law," that a city of equal population could not be incorporated under for "municipal purposes."

But if the Constitution sanctioned a classification, by which municipal corporations, formed by the consolidation of cities and counties, might be classified separately from those not consolidated, this does not attempt to classify the former, nor is it general as to them. It applies exclusively to corporations of that character, which have a population of more than one hundred thousand. Those having a less population are altogether left out; so that this act does not provide, first, for the incorporation of all corporations for municipal purposes; nor, second, for the incorporation of all cities and towns; nor, third, for the incorporation of all city and county governments, which have been or may hereafter become merged and consolidated into one municipal government.

From which it is apparent that this act is repugnant to the rule, which requires that any general law must be as broad as the subject-matter to which it relates. This is not broad enough to cover all municipal corporations, nor even those consisting of cities and counties merged and consolidated into one municipal government.

Some cases have been cited to show that a law which applies to a particular class of things is sufficiently general to meet the requirements of the Constitution. But this act only applies to a part of a class under the classification authorized by the Con-

titution. In *Commonwealth* v. *Patton*, 88 Pa. St. 258, it was held that there could be no proper classification of cities and counties, except by population. Manifestly not, where the Constitution provides that they shall be classified in proportion to population.

Having arrived at the conclusion that the entire act is unconstitutional, it is unnecessary to examine particular sections of it for the purpose of determining whether some of them would not be, even if the act generally were otherwise.

It follows that the alternative writ of *mandamus* issued in this case must be dismissed, and it is so ordered.

MCKINSTRY, J., THORNTON, J., and MCKEE, J., concurred.

MYRICK, J., concurring:

I concur in the judgment, and in the views expressed in the opinion written by Mr. Justice SHARPSTEIN, save as to the conclusion reached in the latter part of the opinion, that the entire act is unconstitutional; as to that, I express no opinion. In regard to the other points referred to in the opinion, I think that the Constitution, directly in two instances, impliedly in one, has placed before the people of the City and County of San Francisco, three courses, either of which may be pursued, viz:

1. They may, under § 8, article xi, (as has been done) elect fifteen freeholders to frame a charter; such charter when framed to be submitted to the people, and if ratified, to be submitted to the Legislature, for its approval or rejection as a whole, without amendment. If ratified and approved, it will supersede any existing charter.

2. If the Legislature has or shall pass a general law providing for the incorporation, organization, and classification, in proportion to population, of cities and towns, they (the people of the City and County of San Francisco) may determine to become organized under such general law whenever a majority of the electors, voting at a general election, shall express their wish to do so.

3. By non-action—that is, by failing to pursue to the end either of the courses above indicated—they may retain and act under their present charter, (known as the Consolidation Act)

except as to such parts as are in conflict with the Constitution, viz., method of street improvements and the like.

[MORRISON, C. J., and ROSS, J., were not present at the argument, and did not participate in the decision.]

[No. 6,405.—Department No. 1.]

GRUM *v.* BARNEY.

ACTION TO RECOVER PERSONAL PROPERTY—PLEADING—ANSWER—FRAUD.—In an action for the recovery of personal property, the complaint alleged ownership and a taking by defendant; and the defendant in his answer denied the ownership, and justified the taking, under an execution issued to him as Sheriff, against one L. *Held*, that the defendant was not bound to anticipate the case of the plaintiff, or to assume that he claimed as vendee of L., and that the answer averred all that was necessary to make up the material issues.

ID.—SALE OF PERSONAL PROPERTY—DELIVERY—CHANGE OF POSSESSION—FRAUD.—In the same action, it appeared that L., being the owner of the property in controversy, consisting of horses and hay, sold and delivered the same to the plaintiff, and at the same time leased to him the ranch on which the property was, and of which the plaintiff, as the servant of L., had for some time been the sole actual occupant; and that the property remained upon the ranch until taken by the defendant. *Held*—the jury having found for the plaintiff, and the Court having granted a new trial—that there was no apparent change in the mode of the plaintiff's occupation, when he ceased to be the servant of L. and became his lessee, and that the Court below did not err in granting a new trial.

APPEAL from an order granting the defendant a new trial, in the Sixth District Court, County of Yolo. DENSON, J.

The facts are stated in the opinion.

Lambert & DeWitt, and *J. C. Ball*, for Appellant.

The delivery was immediate, and the change of possession actual and continued. (*Stephens* v. *Irwin*, 15 Cal. 503; *Lay* v. *Neville*, 25 id. 545; *Godchaux* v. *Mulford*, 26 id. 316; *Ford* v. *Chambers*, 28 id. 20.)

The finding of the jury was fully sustained by the evidence. The pleadings do not present any issue as to actual fraud.

W. B. Treadwell, for Respondent.

The evidence shows that the alleged sale from Lambert to the plaintiff was not accompanied by an immediate delivery, nor followed by an actual or continued change of possession. (Civ. Code, § 3440; *Engles* v. *Marshall*, 19 Cal. 320; *Vance* v. *Boynton*, 8 id. 554; *Woods* v. *Bugbey*, 29 id. 466; *Stevens* v. *Irwin*, 15 id. 503; *Hurlburd* v. *Bogardus*, 10 id. 518; *Weil* v. *Paul*, 22 id. 492; *Malone* v. *Plato*, 22 id. 103.)

It is contended by the plaintiff, that if the defendant in replevin wishes to avail himself of the provisions of § 3440 of the Civil Code, he must specially plead the facts which, by the statute, would avoid the sale, but the plaintiff may plead any title whatever; and it is a cardinal rule in pleading, that a party must be presumed to be ignorant of the particulars of his adversary's title (Stephen on Pleading, 323); and it is therefore sufficient to take issue upon the ultimate fact, which is the title to the property. (*Rous* v. *Gooch*, 5 Coke, 60; *Ashby* v. *Minnitt*, 8 Ad. & E. 121; *Chamberlain* v. *Stern*, 11 Nev. 271; *Quincy* v. *Hall*, 1 Pick. 357; *Clarke* v. *Foxcroft*, 6 Greenl. 296; *Stevens* v. *Frazier*, 2 B. Mon. 250; *Snook* v. *Davis*, 6 Mich. 156.)

MCKINSTRY, J.:

The plaintiff avers that, on a certain day, he was the owner and in possession of certain personal property, and that so being the owner and in possession, the defendant wrongfully took the same, etc., and has ever since withheld, etc. Defendant denies that plaintiff is or was at the times mentioned in the complaint the owner, or entitled to the possession, and alleges that one Lambert was the owner and in possession; that one Asberry recovered a judgment against Lambert; that an execution was duly issued thereon, and placed in the hands of defendant, (alleged to be Sheriff) who levied on the property to satisfy the execution, etc.

The defendant was not bound to anticipate the case of the plaintiff, nor to assume that he claimed as vendee from Lambert, or that he would be willing to admit at the trial that the

latter had ever owned the property. It was for plaintiff to deraign his title at the trial. He might prove it *prima facie* by showing that it was taken out of his possession, or prove it fully by showing that he derived from some other paramount source. If he claimed to have purchased from the alleged judgment debtor, it would not be necessary in the first instance to prove an immediate delivery and continued change of possession, (if the law as between vendor and vendee had been complied with) unless he chose to admit the judgment, execution, and levy. If the property was taken from Lambert, the defendant would not be called on to show either the judgment, execution, or levy, until plaintiff had established his purchase from the judgment debtor. When Asberry was shown to be a judgment creditor, and the other facts connecting the Sheriff with the property were proven, it became necessary for the plaintiff, as vendee from Lambert, to prove an actual delivery and continued change of possession. But—the judgment, execution, and levy having been proved, together with the fact that Lambert was the former owner—plaintiff was *not the owner*, unless the sale to him had been accompanied with an immediate delivery, and was followed by an actual and continuous change of possession. These would be probative facts tending to prove his averment of ownership; and when defendant denied plaintiff's ownership, and averred the other matters alleged, he averred all that was necessary to make up the material issues.

The only actual occupant of the Lambert ranch, for a considerable period of time, prior to the alleged sale of personal property upon it, was the plaintiff. There was no apparent change in the mode or manner of his occupation, when, by the arrangement between Lambert and himself, plaintiff ceased to be the servant of Lambert, and became his lessee. Under the circumstances, we cannot say that the Court below erred in granting a new trial.

Order affirmed.

McKEE, J., and ROSS, J., concurred.

[No. 7,009.—Department No. 1.]

MYERS ET AL. *v.* SPOONER ET AL.

MINING CLAIMS—MINING RULES AND REGULATIONS—CONFLICT OF EVIDENCE—ABANDONMENT.—In an action of ejectment for a mining claim, in which the verdict and judgment was for the defendants, the evidence was conflicting, as to whether the plaintiffs' claim had been staked off and surrounded by a ditch, as required by the mining rules and regulations of the district, and also as to whether the claim had been abandoned; there being, on the latter point, evidence tending to show abandonment, and the plaintiffs' own testimony that he had not intended to abandon. *Held*, upon the first point, that compliance with the mining rules, in the particulars specified, was essential to the validity of the claim; and, upon the second, that the evidence of the plaintiff as to his intentions, was not conclusive, but the intention was to be determined from all the facts and circumstances of the case; and, the evidence being conflicting on both points, that the verdict should not be disturbed.

ID.—EVIDENCE—ERROR.—On the trial the defendants proposed to examine one of the plaintiffs, (who was a witness) as to admissions, and statements, and acts, made and done by him, before he was a tenant in common with his co-plaintiffs; to which the plaintiffs objected, and the objection was overruled. *Held*, that the ruling could not have injured the plaintiffs, since the record failed to show that any such question ever was, in fact, asked or answered by the witness.

ID.—RECORD—MISTAKE—LOCATION—NOTICE.—It appeared on the trial, that the District Recorder, in recording the notice of one of the defendants' claims, omitted by mistake, one of the lines, but in fact the lines were distinctly marked on the ground, as required by the mining rules. *Held*, that the defendants were not bound by the mistake of the Recorder, and that the actual location on the ground was sufficient to impart notice to all comers.

APPEAL from a judgment for the defendants, and from an order refusing a new trial, in the Fourteenth District Court, County of Nevada. REARDAN, J.

The facts are stated in the opinion.

Johnson & Cross, and *E. B. Drake*, for Appellants.

The plaintiffs showed that they had acquired a title which had never been forfeited, abandoned, or otherwise lost. (*McGarrity* v. *Byington*, 12 Cal. 431; *Bell* v. *Bed Rock Co.* 36 id. 214.)

There was no proof of abandonment. The plaintiffs had a right to rest upon the custom of the district, that no labor was required so long as it could not be done to advantage, and the written rules did not provide for a forfeiture. Plaintiffs showed

affirmatively, that there has never been an *intention* to abandon. (*Keane* v. *Cannovan*, 21 Cal. 303–4; *Willson* v. *Cleaveland*, 30 id. 202; *Moon* v. *Rollins*, 36 id. 333; *Bell* v. *Bed Rock Co.* id. 214; *Judson* v. *Malloy*, 40 id. 309–310; *Smith* v. *Cushing*, 41 id. 99–100; *Morenhaut* v. *Wilson*, 52 id. 263; *Stone* v. *Geyser Q. M. Co.* id. 315; *Harvey* v. *Ryan*, 42 id. 626; *Bliss* v. *Ellsworth*, 36 id. 310.)

The Court erred in allowing defendants to contradict the record of the lines of their claim.

Niles Searles, and *A. B. Dibble*, for Respondents.

There was not only a conflict of evidence, but a preponderance in favor of the defendants. We were not estopped by the record of our claim. The sole object of the recording was to give constructive notice, and in this case, the lines were so marked and designated on the ground as to give actual notice of the location to all comers.

Ross, J.:

Ejectment to recover a mining claim. The answer denied the plaintiff's alleged title, averred title in defendants, and interposed the plea of the Statute of Limitations. The case was tried in the Court below with a jury, a verdict rendered for the defendants, upon which judgment was duly entered, and from the judgment, as well as from the order refusing them a new trial, the plaintiffs prosecute this appeal.

We have looked carefully through the record, and cannot say that the evidence does not support the verdict. It appears that on the 26th of November, 1856, E. A. Leathe, one of the plaintiffs, and one Holton, located the ground in controversy by recording the same in the mining records of the district as the Holton & Co. claims, and by posting a notice thereon, and, as some of the witnesses for the plaintiffs testified, by setting stakes at the corners, and digging a small ditch around the claims. The mining rules and regulations of the district required, among other things, that, in locating a claim, stakes should be put up at each of its corners, and also, that it should be bounded by a small ditch. At the trial there was evidence

given, on behalf of the defendants, tending to show that these requirements were not complied with on the part of the locators, under whom the plaintiffs claim. There was, therefore, a conflict in the testimony on this point. Holton, soon after the location mentioned, transferred his interest in the claims to Leathe, and left the State. None of the other locators were, so far as appears, residents of the vicinity, or knew anything of the location. Leathe left the neighborhood in a few weeks, and, for fifteen years next after the location, no work whatever was done thereon, and, so far as appears, no assertion of ownership made to the ground by plaintiffs, or for them, or on their behalf. The ground, however, is what is known among miners as "back-hill" ground, and could not, and cannot, be worked to advantage until the earth in front is carried off. The rules and regulations of the district required all claims to be worked every ten days, but it seems that this rule was generally disregarded, although some of the witnesses for the defendants, who held claims in the district, testified that they had regarded it as all the time in force. The rules and regulations, however, did not provide for any forfeiture or penalty in the event the work was not performed. In April, 1858, the *locus in quo* being apparently vacant land, R. N. Palmer, and others, under the name of the "Joint Stock Company," located twenty claims, recorded them, posted a notice thereon, set stakes at the corners, and dug a ditch around the ground, and soon after sunk a shaft seventy-five feet deep thereon. This location covered a portion only of the Holton location. In October, 1859, Sweetland, Bicknell, and others, believing the Joint Stock Company to have more ground within their lines than they were entitled to hold under the local rules and regulations, located twenty-six claims, covering a portion of the Joint Stock, and the residue of the Holton location. They dug a ditch around the ground located, staked it off, posted a notice thereon describing the ground, and filed a copy thereof for record. In recording this notice the District Recorder omitted, by mistake, one of the lines. In 1869, the Joint Stock Company, the Sweetland and Bicknell Company, and still another company claiming ground to the west of them, consolidated their claims under the name of the Joint Stock Company, reditched the whole, and placed large painted stakes

at the corners and angles thereof, containing the name of the company. The deed of consolidation was executed in 1871. The companies named also sunk a shaft 118 feet deep, drifted, and mined the claim, always keeping the exterior ditches well defined, and the stakes in place, until 1872, when they sold to the present defendants, who have since worked the claims. In November, 1871, R. B. Patton, one of the plaintiffs, obtained a deed from Leathe for one share in the Holton claim, and entered upon it, reset the stakes, and dug a ditch all around it, except on the boundary line between it and the Watson and Stevens claim; and he performed work on the ground during that year and the succeeding years of 1872–3–4 and 5.

We think the evidence sustains the verdict: first, because if it were true, as some of the testimony given on the part of the defendants tended to show, and of which the jury were the judges, that in locating the Holton & Co. claims the important conditions of the local rules and regulations requiring the boundaries to be marked with a ditch, and stakes to be placed at the corners, were not complied with, then it would follow that no valid location was made; and the jury having found for the defendants upon this as well as upon all other questions of fact, we cannot disturb the verdict—there being a substantial conflict in the evidence. Secondly, we cannot say, upon the facts as they are made to appear in the record, that the jury was not justified in finding an abandonment of the Holton & Co. claims prior to the location of the same ground by the parties under whom the defendants claim. Abandonment is a question of intention, and of this intention the jury were to judge, and did judge, in view of all the facts and circumstances of the case. It is true, as stated in the brief of counsel for appellants, that Leathe testified at the trial that there was no intention by him or his co-locators to abandon the claims. But his testimony to that effect was not conclusive upon the jury. If that was so, it would follow that all any party would have to do in order to defeat the defense of abandonment, would be to *say* he did not intend to abandon. The intention, however, is to be derived, as already observed, from all the facts and circumstances of the case. Considering those facts and circumstances, the jury found for the defendants, and we cannot disturb the verdict on that

ground. (*Moon* v. *Rollins*, 36 Cal. 333; *Keane* v. *Cannovan*, 27 id. 303–4; *Harvey* v. *Ryan*, 42 id. 626; *Morenhaut* v. *Wilson*, 52 id. 263.)

It is urged on behalf of the appellants, that the Court below erred in permitting "evidence of the admissions and statements of plaintiff Patton, (as well as of his acts) spoken and done before he was a tenant in common with his co-plaintiffs, to go to the jury against the defendants' objections." This objection of counsel assumes what the record does not show to be the fact. On cross-examination the witness was questioned by the defendants' counsel as to his knowledge concerning the Joint Stock, the Sweetland-Bicknell, and the Joint Stock Company Consolidated locations, and in response to the question, to which there was no objection, the witness said: "I just knew of their locations by the record, and I once saw a stake which had fallen down, way down at the lower end, near the reservoir—just on the bank of the reservoir." The defendants then proposed to question the witness, Patton, concerning conversations had between him and some of the defendants prior to the conveyance to him, to which the plaintiffs objected, and which objection the Court overruled. The ruling, however, could not possibly have injured the plaintiffs, since the record fails to show that any such question ever was, in fact, asked or answered by the witness. The witness subsequently testified, "that on one occasion he carried the chain and assisted in making a survey on the Joint Stock Company's ground, and that he had suggested the name of 'Joint Stock Company' for the claim." This was responsive to the questions of counsel for defendants, already referred to, respecting the knowledge of the witness in the matter of the location by the Joint Stock Company, and was proper.

The only other point made for the appellants which we deem it necessary to notice, is, that the defendants are concluded by the lines of the claim as shown in the records of the mining district. As already stated, the District Recorder, in recording the notice filed by Sweetland, Bicknell, and others, in 1859, omitted, by mistake, one of the lines. Several witnesses for the defendants testified that all of the ground in dispute was embraced within the locations under which the latter claim, and plaintiff

Patton himself, after testifying that a portion of the premises was *omitted*, said: "In saying the Joint Stock Company's lines leave out a portion of the ground in dispute, I mean to say the lines *as described in the mining record;* the stakes and ditches of the Joint Stock Company included all the ground in dispute. There may be a mistake in the record, by the Recorder's skipping and failing to record one of the lines in the Sweetland and Bicknell location. I don't know as to that, I only know the record as it appears."

We do not think the defendants are bound by the mistake of the Recorder in copying the notice in the book of records. (*Kelly* v. *Taylor*, 23 Cal. 11; Weeks on Mineral Lands, § 104.)

There was testimony given at the trial tending to show that all the steps required by the local rules and regulations were performed by the locators making the locations under which the defendants claim; that the lines were distinctly marked upon the ground, a ditch dug and kept open, stakes stuck, and notices posted. This was sufficient to impart actual notice to all comers. No one could have been injured by the mistake of the Recorder, and we think the judgment and order should be affirmed. So ordered.

McKINSTRY, J., and McKEE, J., concurred.

[No. 10,509.—Department No. 1.]

PEOPLE *v.* ALIVTRE.

EVIDENCE—THREATS—CRIMINAL LAW—MURDER.—Upon the trial of an indictment for murder, it appeared that an affray had taken place, shortly before the killing, between the deceased and the defendant, in which the latter had been badly cut, but from the evidence there was a question whether deceased was not fired upon before he commenced to use his knife; and the Court excluded evidence of threats previously made by the deceased, that he intended to kill the defendant, on the ground that it did not appear that the threats were communicated to the defendant. *Held*, that upon the determination of the question, *by whom was the affray commenced?* may have depended the verdict of murder, instead of manslaughter, and that upon this question the evidence was admissible, as tending to show that the deceased attempted to fulfill his threat.

APPEAL from a judgment of conviction, and from an order denying a new trial, in the Superior Court of Kern County. BRUNDAGE, J.

The facts are stated in the opinion.

R. E. Arick, for Appellant.

Attorney-General, for Respondent.

McKINSTRY, J.:

At three o'clock in the morning of the 11th of October, defendant was in bed in the house of one Manuela Sanchez, in a room adjoining that of Manuela and her daughter. Deceased, having ridden a horse to a point about two hundred yards from the house, came to the outer door and (as would seem) demanded admittance, which was refused by the woman Manuela, alleged to have been at one time his mistress; whereupon—as claimed by defendant—deceased burst open the door, and at once leaped upon the defendant, who was still in bed, and commenced stabbing him with a knife. Defendant was badly cut in several places. The testimony for the prosecution, however, if unexplained, would leave it doubtful whether deceased was not fired upon before he commenced to use his knife. Thus, Cayetana Barrejon: "I saw deceased, Eugenio Morales, at a distance of seventy or eighty yards. He walked some distance and sat down. I heard the first shot in Manuela Sanchez's

house. I was in my room waiting on my child. I jumped out, and when I opened the door I heard a second shot. Four men jumped over the fence at Manuela's. They passed within four or five feet of me. They went to where deceased was, and commenced shooting," etc.

If defendant killed deceased, or was present, aiding, or abetting the killing, it was certainly important that the jury should be informed of the affray in the Sanchez house, and whether the defendant or deceased was there the assailant. If defendant was attacked by deceased, with a deadly weapon, when in bed in his own room, that circumstance was a very grave one to be considered when the jury were determining whether defendant had been provoked, and the degree of provocation, and whether sufficient time had elapsed for defendant's passion to cool. The defendant was found guilty of murder, and any evidence tending to prove that the original assault was by the deceased with a deadly weapon, had a bearing upon the question whether the offense was murder or manslaughter.

John Crawford, a witness for the defense, was asked, "State whether you ever had any conversation with deceased, relative to any difficulty that he had with defendant, when it was, and what was said, if anything?" Objected to. The Court—"Unless you can show that these threats were communicated to defendant, the testimony is not admissible."

Defendant, by his counsel, for the purpose of showing the intention of the deceased to attack the defendant, and to show the intent with which Morales resorted to the house of Manuela, and also his feelings toward defendant, offered to prove by John Crawford, a competent witness, then upon the witness stand, duly sworn as such, that prior to the difficulty between the defendant and Morales, the deceased made threats against the life of the defendant, stating that he "intended to kill defendant." Objected to, and the Court refused to permit the witness to testify, to which ruling of the Court the defendant then and there excepted.

This was error. In *People* v. *Arnold*, 15 Cal. 476, it was held, that when a rencounter occurs between two persons, one of whom is killed, and the circumstances are equivocal as to which one of the two commenced the affray, the fact that one of the

parties had previously procured a weapon for the avowed purpose of using it against the other—although the fact is not communicated to defendant—is a circumstance tending to show that the purpose was fulfilled. And the same doctrine in respect to threats not communicated to the party threatened is adopted in *People* v. *Scoggins*, 37 Cal. 676. In the case before us, deceased was not killed at the affray in the house—treating that as a separate affray—but the *threat* became an equally important circumstance, since upon the determination of the question, *by whom was that affray commenced?* may have depended the verdict of murder instead of manslaughter.

Judgment and order reversed, and cause remanded for a new trial.

ROSS, J., and MCKEE, J., concurred.

[No. 6,815.—Department No. 1.]

ASTELL *v.* PHILLIPPI.

CERTIORARI—JUDGMENT.—It seems that upon a writ of *certiorari*, where the decision is adverse to the plaintiff, the regular form of the judgment is to affirm the judgment reviewed.

JURISDICTION—JUSTICE'S COURT.—In an action for the recovery of specific personal property, in a Justice's Court, the standard of jurisdiction is "the value of the property," and it would seem, (though in this case *held* unnecessary to decide) that the Justice's jurisdiction for the incidental damages for detention is unlimited; and at all events the demand for damages cannot oust the Justice of jurisdiction, if the value of the property is less than $300.

APPEAL from a judgment for the defendant in the Sixth District Court, County of Sacramento. DENSON, J.

Application for a writ of *certiorari* to J. S. Phillippi, Justice of the Peace, to review his proceedings in an action brought by James F. Frey against R. Astell, for certain personal property, or its value, $299, and $50 damages for detention. After the defendant, (in the Justice's Court) had demurred and answered, objecting to the jurisdiction of the Court, the plaintiff was permitted to amend by striking out the demand for damages, and,

thereupon, after trial, the Justice rendered judgment in his favor for the property, or its value, $299, in case a delivery could not be had, and for costs.

Charles A. Waring, for Appellant.

L. S. Taylor, for Respondent.

MCKINSTRY, J.:

The judgment of the District Judge dismissing the writ of *certiorari* would, perhaps, have been more regular in form if it had affirmed the judgment of the Justice, but the appellant has suffered no injury from, and cannot complain of this. The test of the jurisdiction of the District and Justice's Courts, respectively, under the former Constitution, was "the demand, exclusive of interest, or the value of the property in controversy." (Const. of 1849, art. vi, §§ 6 and 7.) There were two classes of cases, in one of which the *demand*, and in the other of which the value of the property, was referred to as determinative of the question of jurisdiction. The primary purpose of an action "for the recovery of specific personal property" is, as its name indicates, to recover specific property; the judgment for its value, in case the property has not been and cannot be returned, is an alternative. The District Court would not have had jurisdiction of the cause of *Frey* v. *Astell*, because the value of the property was not $300. This view is somewhat strengthened by the analogies. The Constitution provided that the District Court should have jurisdiction when the demand, "exclusive of interest," was for $300 or more. The Justices, therefore, had power to render a judgment for any amount, however great, provided it was made up in part of a principal of less than $300. It would seem, in like manner, that when the standard of jurisdiction is "the value of the property," the recovery of which is the main object of the proceeding, the incidental damages for the detention are not limited. This, however, it is not necessary to decide; it may be that the demand for damages for the detention is mere surplusage. We only say that such demand did not oust the Justice of jurisdiction, since he

had jurisdiction if the value of the property was less than $300. (Code Civ. Proc. § 114, subd. 5.)

Judgment and order affirmed.

ROSS, J., and MCKEE, J., concurred.

[No. 6,344.—Department No. 2.]

CHANDLER *v.* CHANDLER.

ACTION TO QUIET TITLE—EQUITY—RETURN OF CONSIDERATION—MAXIM.—A plaintiff cannot come into a Court of Equity, and ask for a decree debarring the defendant from asserting a claim under an instrument executed by the former, without restoring the consideration received by him.

ID.—ID.—DEED—BARGAIN AND SALE—STATUTE OF USES.—The plaintiff, and his wife, in the year 1869, executed to the defendant a deed whereby, in consideration of the sum of $2,000, they granted, bargained, and sold to the defendant and his heirs and assigns forever, a certain tract of land; but it was expressly provided, and the deed was made upon the express condition, that the parties of the first part should have and retain the entire use and control of the said demised premises, so long as they, or either of them, should live. In an action to quiet title, brought by the plaintiff against the defendant, this deed was adjudged to be void, and the plaintiff's title to be good.

Upon appeal, *held*—assuming that the deed was inoperative as a common law conveyance, because an attempt to create or convey a freehold to commence *in futuro*:

1st. That a freehold to commence *in futuro* could be created by a *bargain and sale*, operating under the Statute of Uses; and that, if the Statute of Uses was part of our law, prior to the Codes, the deed was valid.

2nd. That, if the Statute of Uses was not in force in this State when the deed was executed, the bargain and sale would be recognized and enforced in a Court of Equity, as it would have been before the statute.

3rd. That in either case, the Court, as a Court of Equity, had power to settle and determine the actual rights of the parties, and prevent future complications, by decreeing a formal conveyance of the fee from the plaintiff to the defendant, and a reconveyance for the life of the former by the latter, and this should have been done.

STATUTE OF USES.—*Query*, whether the Statute of Uses, (27 Henry 8, ch. 10) was ever in force in this State.

STATUTE OF ENROLLMENTS.—The Statute of Enrollments (27 Henry viii, ch. 16) has never been in force in this State.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Sixth District Court, County of Yolo. DENSON, J.

George Cadwalader, for Appellant.

The rule, that estates to commence in *futuro* cannot be created by deed, is limited only to *common-law* conveyances, and does not apply to conveyances operating under the Statute of Uses. (*Rogers* v. *Eagle Fire Co.* 9 Wend. 611.)

That the Statute of Uses is in force in this State, there can be little doubt (4 Kent, 299); and the deed is good under that statute, either as *a bargain and sale*, or as *a covenant to stand seized to uses.*

The operation of these two conveyances is the same—the only difference between them being, that the former is founded on a pecuniary consideration, and the latter on one of blood or marriage.

In the deed in question there is not only a moneyed consideration, but also a consideration of blood. The deed is therefore good, either as a covenant to stand seized to uses, or as a bargain and sale. (*Pray* v. *Pierce*, 7 Mass. 381; *Rogers* v. *Eagle Fire Co.* 9 Wend. 611; *French* v. *French*, 3 N. H. 242; *Bell* v. *Scammon*, 15 id. 394; *Cook* v. *Brown*, 34 id. 460; Cornish on Uses, 162; 1 Hcy. 259; *Jackson* v. *Swart*, 20 John. 85; *Gale* v. *Coburn*, 18 Pick. 397; *Wallis* v. *Wallis*, 4 Mass. 136; *Davenport* v. *Wynne*, 6 Ired. 128; *Jackson* v. *Wood*, 20 John. 85; *Jackson* v. *McKenny*, 3 Wend. 233; *Brewer* v. *Hardy*, 22 Pick. 376; *Chancellor* v. *Windham*, 1 Rich. 161.)

It is settled in New York—overruling the cases to the contrary—that a freehold, to commence *in futuro*, may be conveyed by an instrument to take effect as a bargain and sale. (*Jackson* v. *Dunsbagh*, 1 Johns. Cas. 91; *Rogers* v. *Eagle Fire Co.* 9 Wend. 611.)

If the deed is not valid as a conveyance, it may be treated as an agreement to convey, and equity will enforce it. (*Sherman* v. *Dodge*, 28 Vt. 26.)

S. G. Harper, for Respondent.

It was conceded in the argument of this cause that an estate of freehold, to commence *in futuro*, could not be created previous to the adoption of the Civil Code. This point was de-

cided in *Hawes* v. *Stebbins*, 49 Cal. 369, which is on all fours with this case. The deed under discussion is a plain bargain and sale deed.

A deed cannot operate as a covenant to stand seized to uses, unless the consideration of blood or marriage be expressed on its face. (*French* v. *French*, 3 N. H. 234; *Underwood* v. *Campbell*, 14 id. 393; *Lynch* v. *Livingston*, 8 Barb. 485.)

McKINSTRY, J.:

The plaintiff prays for a decree quieting his title to certain lands, and that defendant has no claim or title thereto. Defendant relies upon an instrument hereinafter recited, which was executed and delivered by plaintiff in consideration of two thousand dollars paid him by defendant. It is perfectly obvious that plaintiff cannot come into a Court of Equity and ask for a decree debarring defendant from asserting any claim under the instrument, without restoring the money.

But defendant has set forth the nature of his claim, and is entitled to have his rights adjudicated. The decision of this case, therefore, must turn upon the construction of the instrument following:

"This indenture, made the fifth day of October, in the year of our Lord, one thousand eight hundred and sixty-nine, between Solomon Chandler and Naomi Chandler, his wife, of the County of Yolo, and State of California, parties of the first part, and Gates S. Chandler, the party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of two thousand dollars in gold coin of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain lot, piece, or parcel of land, situate, lying, and being in the County of Yolo, and State of California, and bounded and particularly described as follows, to wit: the north half of the south-east quarter of section thirty (30), and

the north half of the south-west quarter of section twenty-nine (29), all in township nine (9) north, range two (2) east, Mt. Diablo base and meridian, containing one hundred and sixty acres.

"*Provided always, and this indenture is made upon the express condition, that the said parties of the first part shall have and retain the entire use and control of said demised premises, so long as they or either of them shall live, and anything in this indenture to the contrary thereof in anywise notwithstanding.*

"Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, homestead, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to the said premises, and every part and parcel thereof, with the appurtenances. To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the said parties of the first part and their heirs, the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

"In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written. "SOLOMON CHANDLER. [Seal.]

"NAOMI CHANDLER. [Seal.]

"Signed, sealed, and delivered, in the presence of C. S. Frost."

It may be assumed that the deed is inoperative as a common-law conveyance of the legal title, because an attempt to create or convey a freehold to commence *in futuro*. (*Hawes* v. *Stebbins*, 49 Cal. 369.) If it be also assumed that the English *Statute of Uses* was part of our law prior to the Codes, the deed could not operate as a *covenant to stand seized to uses*, because the only consideration for such covenant was blood or marriage. (2 Bl. Com. 338.) Whether the statute 27 Henry viii, chap. 10,

is a portion of our law or not, it is quite certain that the *Statute of Enrollments*, 27 Henry viii, chap. 16, has never been in force in this State, because its provisions are in conflict with our system of laws, and with specific statutes, and the common law of England has never been adopted "as a rule of decision" only so far as it is not repugnant to the laws of this State. (Pol. Code, § 4468.) If the Statute of Uses was part of our law, one could have covenanted to stand seized, or bargain and sell, to the use of another at a future day. (4 Kent, 298.) Chancellor Walworth, in the Court for the Correction of Errors, in an opinion, "the reasoning of which," says Professor Washburn, 3 Real Prop. 325, "would seem to leave little doubt in the matter beyond what arises from the circumstances that other courts have taken a different view of the law," shows that a freehold *in futuro* could be created by a bargain and sale operating under the Statute of Uses. (*Rogers* v. *Eagle Fire Co. of New York*, 9 Wend. 621.)

If the Statute of Uses was not in force in this State when the deed was executed, the bargain and sale will be recognized and enforced in a Court of Equity, as it would have been before the statute. When uses were raised by conveyances at common law, operating by transmutation of possession, the uses declared in such conveyances did not require a consideration. The real owner had divested himself of the legal estate, and the person in whom it was vested being a mere naked trustee, equity held him bound in conscience to execute the directions of the donor. If there were no uses declared, and no consideration, the use resulted to the feoffor or releasor, for, under such circumstances, it would not be presumed that the feoffor or releasor intended to part with the use. In case of covenants to stand seized, and of a bargain and sale, prior to the Statute of Uses, the inheritance remained in the contracting party. In such case the transaction was a mere contract which required either a good or a valuable consideration, without which it would not be enforced by a Court of Equity. (4 Kent.) Where, however, the covenant to stand seized, or bargain and sale, was supported by a proper consideration, there can be no doubt that a Court of Equity would, and now should, contemplate the actual rights of the parties, and construe the instrument in such manner as to

effectuate their intention. Admitting the instrument cannot be enforced as a grant, it is a contract on the part of the bargainer to transfer the whole legal estate to the bargainee, and on the part of the latter to convey a life estate to the former. The decree might have provided for appropriate conveyances to carry out the evident purpose of the agreement.

Nor is it necessary to decide whether the English Statute of Uses was adopted in this State as a portion of the common law. If the clause in the deed may be construed as a declaration of trust by *defendant*, and the effect of the statute was to transfer the life estate to *cestui qui use*—or if its effect was to give a life estate to the bargainer with remainder in the bargainee—or if, by any other theory as to the effect of the statute, the use and legal title were united during the life of plaintiff, a Court of Equity, to whom the whole matter has been submitted, has power to settle and determine the actual rights of the parties, (and prevent future complications) by decreeing a formal conveyance of the fee from plaintiff to defendant, and a reconveyance for the life of the former by the latter. In our opinion this should be done. (See *Sherman* v. *Estate of Dodge*, 2 Wms. (Vt.) 26.)

The order denying a new trial is affirmed. The judgment is reversed, and the Court below is directed to enter a decree in accordance with the foregoing opinion.

ROSS, J., and MCKEE, J., concurred.

[No. 6,356.—Department No. 1.]

CROWLEY *v.* THE GENESEE MINING COMPANY.

CORPORATIONS—CONTRACT — AGENT.— The common-law rule that a corporation has no capacity to act or to make a contract, except under the common seal, has been long since exploded in this country; and the authority of an agent to make a contract may be inferred from his admitted relations to the corporation, or from its course of business. *Held*, accordingly, in an action against a corporation, upon a contract made with one who was admitted to be the president and superintendent and general managing agent of the corporation, that this admission was sufficient evidence of his authority to make the contract, and that it was unnecessary to show any vote or other corporate act giving him such authority.

APPEAL from an order denying the defendant a new trial, in the Twenty-first District Court, County of Plumas. CLOUGH, J.

J. C. Chapman, and *J. D. Goodwin*, for Appellant.

The authority of Quin to make the contract could not be implied from his admitted relation to the defendant. (*Gashwiler* v. *Willis*, 33 Cal. 11; *Yellow Jacket* v. *Stevenson*, 5 Nev. 224.) It was competent for the defendant to show that it never authorized or ratified the execution of the contract. The president, managing agent, and superintendent of a corporation cannot, by reason of such relation bind the corporation. (*Hall* v. *Auburn T. Co.* 27 Cal. 255; *Blen* v. *B. R. A. Water & M. Co.* 20 id. 602; *Richardson* v. *S. R. W. & M. Co.* 22 id. 150.)

W. W. Kellogg, *R. H. F. Variel*, and *Haymond & Allen*, for Respondent.

The authority of Quin to make the contract is established from his admitted relations to the corporation. (37 Cal. 599; Civ. Code, §§ 2307, 2310, 2311, 2319, 2332, 2338; *Jones* v. *Clark*, 42 Cal. 180.)

McKEE, J.:

On the trial of this case in the Court below, it was admitted that one M. J. Quin was the president of the corporation, defendant in this case, and the superintendent and managing agent of its mines in Plumas County, and had full control of its business in

that county, its principal place of business being in the city of San Francisco. It was proved that he was the principal stockholder in the company. On the 11th of September, 1877, Quin employed the plaintiff to work in a quartz mine in Plumas County, belonging to the defendant, for the purpose of taking out what is known as "tribute rock," and delivering it at the defendant's quartz mine, to be crushed by the company at its mill, free of cost or expenses to the plaintiff; and, as compensation for his services, one-half of the gross amount of the proceeds of each crushing was to be paid to the plaintiff. On the 12th of September, 1877, the plaintiff went to work under this agreement of taking out rock from the mine, and continued to work for the defendant until January, 1878, when he was discharged by Quin.

Two crushings were made by the defendant, of rock taken out and delivered by the plaintiff: one on the 25th of October, 1877, and the other on the 7th of February, 1878. Of the proceeds of the first crushing, the plaintiff was paid according to the terms of the agreement. From the last crushing there was realized fifty and two-eighths ounces of gold dust, which was sent to the San Francisco mint for coinage; and after paying all expenses and mint charges, there was due to the plaintiff over $400, which the defendant failed or refused to pay to the plaintiff; and hence this suit.

It is objected by the corporation, that the agreement which was made with the plaintiff by its president, superintendent, and managing agent, is not a contract, but a lease. But the agreement is a contract of employment under § 1965, Civil Code; and it is binding on the defendant if Quin had authority to make it. Plaintiff does not rely on the existence of an authority of record; he did not claim, or prove, that the Board of Directors of the defendant had by resolution or order authorized Quin to make such a contract, or that the latter had ever informed the directors that he had made it. He himself claimed that Quin had authority from the admitted relations existing between him and the defendant.

Upon this theory the case was tried in the Court below; and when the defendant offered to prove by Quin that the Board of Directors never authorized him to make such a contract with

the plaintiff or any one else, and that he never informed the board of the execution or existence of the contract, and that the directors knew nothing of it, the Court sustained an objection to the offer, and afterward refused to give the following instruction to the jury: "Neither the president, superintendent, nor the managing agent of the corporation can, by virtue of their said offices, execute such a contract binding the corporation." And, while the Court gave the following instruction to the jury, which was asked by the defendant, viz., "If you believe from the evidence that the said Quin, as the managing agent or the superintendent of the defendant, entered into the contract charged in plaintiff's complaint, before you can hold this defendant liable for a breach of said contract, you must further find that either the Board of Directors authorized said Quin to make such contract, or that, after being informed of the nature of said contract, the Board of Directors ratified the same"—yet it accompanied the instruction with the following modification, viz.: "But the fact that such authority was given to the superintendent may be inferred from his admitted relations to the corporation defendant."

The question therefore arises, whether the appointment of an agent for a corporation to make a contract for work and labor, or services, upon the property of the corporation, must be made under seal or by resolution, or whether it can be inferred from the admitted relations of the agent to the corporation, or from the course of business of the corporation itself?

The common-law rule, that a corporation has no capacity to act, or to make a contract, except under its common seal, has been long since exploded in this country. Even in England, it has been found to be impracticable, so that the classes of cases which constitute exceptions to the rule have become so numerous that the exceptions have almost abrogated the rule. In the United States, nothing more is requisite than to show the authority of the agent to contract. That authority may be conferred by the corporation at a regular meeting of the directors, or by their separate assent, or by any other mode of their doing such acts. "If this were not so," says Mr. Chief Justice Redfield, "it would lead to very great injustice, for it is notorious that the transaction of the ordinary business of railways, banks,

and similar corporations in this country, is without any formal meetings or votes of the board. Hence, there follows a necessity of giving effect to the acts of such corporations, according to the mode in which they choose to allow them to be transacted. If this were not done, it would become impossible to dispose of such contracts with any hope of reaching the truth and justice of the rights and duties of the several parties involved. * * * This is merely holding corporations to such rules of action as they see fit to adopt for their own guidance and the transaction of their business." (*Bank of Middlebury* v. *Rutland R. R. Co.* 30 Vt. 159.) When, therefore, the defendant admitted, on the trial of the case in hand, that Quin was its president and superintendent, and general managing agent, this was sufficient evidence of his authority to make the contract with the plaintiff, and it was not necessary for the plaintiff to show any vote, or other corporate act, constituting him the agent of the corporation. It would not be in accordance with justice, or the interests of society, to allow corporations to deny the authority of such agents, or to repudiate contracts made by them for work and labor from which they derive benefit. So in *Goodwin* v. *The Union Screw Company*, where it appeared that the business of manufacturing screws was conducted under the general management of one of its directors, who made a verbal contract with the plaintiff to work, in the shop, at manufacturing screws for the defendant, the Supreme Court of New Hampshire held, that where one has the actual charge and management of the general business of a corporation, with the knowledge of the members, or the directors, this is sufficient evidence of authority, and the company will be bound by his contracts made on their behalf, within the apparent scope of the business intrusted to him. (34 N. H. 378.) And in *Boyington* v. *The Wilson Sewing Machine Company*, where it appeared that an architect had drawn plans for a building for a corporation, under a verbal contract made with one who was acting as president, executive manager, and principal stockholder of the company, the Supreme Court of Illinois held that the contract was binding upon the corporation. "A corporation," says the Court, "which suffers appearances to exist, and its officers and agents to so act, as to give one employed by such officers and agents reason to be-

lieve that he is employed by the company, becomes liable to such person as his employé to pay for the services rendered." (73 Ill. 534. See also, 29 Ala. 21; 7 Cranch, 309; 8 Wheat. 338; 12 id. 64.)

Hence, the Court below did not err in rejecting the evidence which was offered by the defendant, or in overruling the defendant's motion for a nonsuit, or in refusing to give to the jury the instructions which the defendant requested, or in modifying those which were given at the defendant's request.

Order affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

[No. 7,015.—Department No. 1.]

EDDELBUTTEL ET AL. *v.* DURRELL ET AL.

SPECIFICATIONS.—STATEMENT ON MOTION FOR NEW TRIAL.—Specifications, in a statement on motion for new trial, "that the first finding is not sustained by the evidence," "that the second finding is not sustained by the evidence," etc., *held*, (with reference to the findings cited by the Court) to be insufficient.

APPEAL from a judgment for the defendant, and from an order denying a new trial, in the Twenty-first District Court, County of Plumas. CLOUGH, J.

R. H. F. Variel, and *J. D. Goodwin*, for Appellants.

E. T. Hogan, for Respondents.

ROSS, J.:

The plaintiffs, by this action, sought to restrain the defendants from the diversion of certain waters of a certain creek in Plumas County. The grounds for the relief asked are thus stated in the amended complaint: "Plaintiffs, by this amended complaint, for a cause of action, allege, that since the 10th day of December, 1875, they have been and they now are the owners of, and entitled to the use, occupation, and possession of all the waters naturally flowing in the south branch of Willow

Creek, in Plumas township, Plumas County, California, except that certain amount to which the defendants, or some of them, as owners of a certain ditch known as the 'Old Hardy Ditch,' are entitled, the said amount being not to exceed forty (40) inches, according to miners' measure. That since the said 10th day of December, 1875, and up to the entry of the defendants hereinafter set forth, these plaintiffs have been in the continuous use, occupation, and possession of said waters, in the working of certain mining claims, situated in the bed of said creek, below where the said Hardy ditch diverts water from the same. That on or about the 10th day of November, 1878, the said defendants proceeded to enlarge the said Hardy ditch, and to divert thereby all the waters flowing in said creek, and they have ever since remained in the possession of the whole of said waters, and have deprived and threaten to deprive these plaintiffs of the use of the same."

The first, second, and third findings of the Court below are as follow:

"*First.*—That at no time since the 10th day of December, A. D. 1875, were the plaintiffs, or either of them, the owners of the whole, or any part of the waters naturally flowing in the south branch of the Willow Creek described in their amended complaint herein.

"*Second.*—That at various times between the 10th of December, 1875, and some time in October, 1878, the said plaintiff used, in mining the bed of said south branch of Willow Creek, such portion of the waters thereof as flowed past the head dam of the Hardy ditch referred to in the amended complaint: and such use is the only evidence produced of possession of the said waters on the part of plaintiffs.

"*Third.*—That on the 10th day of November, 1878, nor at any time between that date and the commencement of this action, were said plaintiffs, or either of them, in the possession or entitled to the possession of any of the waters of said south branch of Willow Creek."

The specifications of error found in the statement on motion for a new trial are in these words:

"*First.*—The first finding of the Court is not sustained by the evidence, and it is contrary thereto.

"*Second.*—The second finding is not sustained by the evidence, and it is contrary thereto.

"*Third.*—The third finding is not sustained by the evidence, and it is contrary thereto."

By § 659 of the Code of Civil Procedure it is provided, that "when the notice of the motion (for a new trial) designates as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify *the particulars in which such evidence is alleged to be insufficient.* When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. *If no such specifications be made, the statement shall be disregarded* on the hearing of the motion."

This is statute law, and we must obey it. In the case before us there is not even an attempt made to specify the particulars in which the evidence is alleged to be insufficient to sustain the findings of the Court below. Appellants might as well have said, in a general way, that none of the findings of the Court were sustained by the evidence.

The purpose of the statute is apparent. It was to direct the attention of Court and counsel to the particulars relied on by the moving party, to the end that the evidence bearing on the specifications of error might be inserted in the statement, and considered by the Court.

Judgment and order affirmed.

McKINSTRY, J., and McKEE, J., concurred.

[No. 6,571.—Department No. 1.]

WRIGHT *v.* LAUGENOUR.

STATE LANDS — CONTEST — PLEADING. — In an action to determine a contest arising in the Surveyor-General's or Register's office, each party must allege facts sufficient to show that he is entitled to the issue of a certificate to him.

ID.—APPLICATION TO PURCHASE—LAND WARRANTS.— An application to purchase State lands by the location of school land warrants, made subsequent to the Act of April 27th, 1863, is not invalid for want of the affidavits required by that act—such applications being expressly excepted from the operations of the act by the proviso in the second section.

ID.—ID.—ID.—DEPUTY.—Upon such an application, certain affidavits required by the Act of April 23rd, 1858 (as amended by § 7 of the Act of April 22nd, 1861,) were made before a person signing the *jurat* as "Deputy Locating Agent." *Held*, that the administration of an oath is a function ministerial in its nature, and the State Locating Agent, as a ministerial officer, had power to appoint deputies.

ID.—ID.—ID.—ID.—ESTOPPEL.— Upon the application of the defendant, one J. P., as Deputy State Locating Agent, under appointment made by the State Locating Agent, made application to the Register of the Land Office, on behalf of the State of California, for the land in controversy; and in pursuance of that application the land was listed to the State. Afterward the plaintiff made his application. *Held*, that he was estopped from denying the authority of the Deputy Locating Agent.

APPEAL from a judgment for the defendant, and from an order denying a new trial, in the Sixth District Court, County of Sacramento. DENSON, J.

The defendant, Thomas Laugenour, on the 9th day of July, 1864, made his application to the State Locating Agent, purporting to be under the provisions of the Act of April 27th, 1863, to purchase the land in controversy. The application was accompanied by his own affidavit and that of three others, to the effect required by § 3 of the Act of April 23rd, 1858, (as amended by § 7 of the Act of April 21st, 1861) the *jurat* to the latter affidavit being subscribed, "John Prentice, Deputy Locating Agent." On the next day the said Prentice, as Deputy State Locating Agent, indorsed on the application his acceptance thereof, and filed an application for the location of the land with the Register of the United States Land Office at Marysville—the application being signed, "G. W. Colby, State Locating Agent, etc., by John Prentice, Deputy"; and on the 24th day of October, 1867, filed the application with the proper indorsements in the office of the Surveyor-General. The land was listed to the

State on the 3rd day of February, 1876, in pursuance of this location.

The application of the plaintiff was made to the Surveyor-General on the 8th day of February, 1876, and the contest referred by him to the District Court for trial. The other facts are stated in the opinion.

Jo. Hamilton, and *C. P. Sprague*, for Appellants.

The respondent's application was made under the Act of March 27th, 1863. (Stat. 1863, p. 591.) He elected to make his application under that act, and by that act it must be tested. The complaint alleges a failure by the respondent to comply with §§ 28 and 29 of the act; and the allegation is not denied. There was, therefore, an utter failure to comply with the provisions of the act; and the plaintiff's application should be approved. (*Cunningham* v. *Crowley*, 51 Cal. 128.)

The affidavit required by the Act of April 23rd, 1858, was not made before any one authorized to administer oaths. The act does not provide for the appointment of deputies by the State Locating Agent.

W. C. Belcher, and *W. B. Treadwell*, for Respondent.

The plaintiff neither alleged in his complaint, nor proved at the trial, that he was a resident of the State of California, or that he was of lawful age, or that he had not entered any land in part satisfaction of the grant in lieu of 16th and 36th sections, which, together with that which he now seeks to purchase, exceeded 320 acres. (Pol. Code, § 3500; *Christman* v. *Brainard*, 51 Cal. 534; *Woods* v. *Sawtelle*, 46 id. 389.)

Defendant's application was not invalid for want of the affidavits required by the Act of April 27th, 1863, as his case came within the proviso of the second section. The application was in strict accordance with the provisions of the statutes in force at that time. (Stat. 1858, p. 248, § 3; Stat. 1861, p. 220, § 7.)

The State Locating Agent was a ministerial officer, and had a right to appoint deputies, without any express authorization

by statute. (*Jobson* v. *Fennell*, 35 Cal. 711; *Taylor* v. *Brown*, 4 id. 188; *Phelps* v. *Whinchcomb*, 3 Bulst. 77.)

McKINSTRY, J.:

In an action to determine a contest arising in the Surveyor-General's or Register's office, each party must allege the facts which, in his view, would authorize the issue of a certificate to him. (*Christman* v. *Brainard*, 51 Cal. 534.)

The plaintiff neither alleged in his complaint, nor proved at the trial, that he was a resident of the State of California, or that he was of lawful age, or that he had not entered any land in part satisfaction of the grant, *in lieu of sixteenth or thirty sixth sections*, which, together with that which he now seeks to purchase, exceeded three hundred and twenty acres. He was, therefore, not entitled to judgment in the Court below.

The second section of the Act of April 27th, 1863, contains the following proviso: "Nothing in this act shall be construed to affect the sale of lands, by the location of *school land warrants*, which lands shall be located and paid for in the manner now provided by law."

Defendant's application is not invalid for want of the affidavits required by the act referred to, since it comes within the proviso above quoted.

It is urged by the plaintiff and appellant that the application of respondent was invalid under the Act of 1858, (Stat. 1858, p. 248) inasmuch as certain affidavits were made before a person signing the *jurat* as "Deputy Locating Agent." The administration of an oath is a function ministerial in its nature, and the State Locating Agent, as a ministerial officer, had power to appoint deputies. (*Jobson* v. *Fennell*, 35 Cal. 711.)

The plaintiff has no right in or to the land unless it is property of the State; and as the contest is, whether plaintiff, or defendant, or either, is entitled to purchase from the State, the plaintiff is estopped from denying the authority of the Deputy Locating Agent. It is not necessary to decide that the State may not dispute it.

Judgment and order affirmed.

ROSS, J., and McKEE, J., concurred.

[No. 6,747.—Department No. 1.]

HUMPHREYS v. HARKEY.

ACTION TO RECOVER PERSONAL PROPERTY—PLEADING—JUSTIFICATION—EVIDENCE—FRAUD.—In an action to recover personal property, where the defendant justified as Sheriff under a judgment and execution against the plaintiff's vendor—whose property the answer alleged the goods to be—the Court, on the ground that fraud had not been specially pleaded, excluded from the evidence the judgment roll under which the defendant justified, and also evidence tending to show that the sale by the judgment debtor, under which the plaintiff claimed, was not followed by an actual and continued change of possession. *Held*, that the defendant was not bound to anticipate the case of the plaintiff, or to assume under whom he would claim title, and that the ruling of the Court was therefore erroneous.

APPEAL from a judgment for the plaintiff, and from an order refusing a new trial, in the Tenth District Court, County of Sutter. KEYSER, J.

L. J. Ashford, for Appellant.

Stabler & Bayne, for Respondent.

ROSS, J.:

The complaint charges that on the 18th day of November, 1878, the plaintiff was, and for a long time prior thereto had been, the owner, and in possession of a certain lot of stock—cattle and calves. That on the day mentioned, in the County of Sutter, the defendant wrongfully took the property from the possession of the plaintiff, and still unlawfully detains the same, to plaintiff's damage, etc. Answering the complaint, the defendant averred that at the time therein mentioned he was Sheriff of Sutter County; that on the 16th day of October, 1878, one Ashford recovered judgment in the Tenth District Court against one W. F. Nelson for a certain sum of money, which judgment was on the same day entered of record, and duly docketed; that afterward, and on said 16th of November —no part of the judgment having been paid—Ashford caused an execution to be duly issued upon the judgment, and directed and delivered to the defendant; "that in obedience to the commands of said execution, this defendant, as such Sheriff, on the 18th day of November, 1878, seized upon and took into his pos-

session the cattle and calves in the complaint mentioned, and levied the said execution upon the same, and afterward, on the — day of November, 1878, after due and legal notice given, sold the said cattle and calves to satisfy said execution, as the property of said W. F. Nelson, whose property the said cattle and calves then were. * * * That said seizing, levying upon, and selling said cattle and calves is the same taking and detention thereof in the complaint complained of."

On the trial the plaintiff testified that he bought the property in question from Nelson, "excepting the calves, and two or three yearlings that were raised from the cows," and was the owner thereof at the time of the levy and sale. The defendant offered in evidence the judgment roll in *Ashford* v. *Nelson*, and also offered testimony tending to show that the sale by Nelson to the plaintiff was not followed by an actual or continued change of possession of the property—all of which testimony was excluded by the Court below, on the ground that the sale from Nelson to plaintiff was not assailed in defendant's answer.

In the recent case of *Grum* v. *Barney*, 55 Cal. 254, we had occasion to consider the same question, and there held that the defendant was not bound to anticipate the case of the plaintiff, nor to assume under whom he claimed title. We are entirely satisfied of the correctness of that decision, and it results that the Court below erred in the rejection of the proffered testimony. The circumstance mentioned by the learned Judge who tried the cause, to the effect that even if the excluded testimony was admitted and considered, he should still have to find that there was a continued change of possession, cannot, it is obvious, avoid the necessity of a reversal of the judgment and order. The evidence ruled out was competent and material, and the defendant had a right to have it admitted and considered. The *effect* to be given to it, when admitted, is altogether another question.

Judgment and order reversed, and cause remanded for a new trial.

McKINSTRY, J., and McKEE, J., concurred.

[No. 6,589.—Department No. 1.]

DICKENSON ET AL. *v.* BOLYER ET AL.

MECHANICS' LIEN.—Section 1188 of the Code of Civil Procedure (quoted in the opinion) applies only to cases in which one claim is filed against two or more *separate and distinct* "buildings, mining claims, or other improvements owned by the same person," and not to a case where all of the work was performed upon one and the same piece of property, although upon different portions of it.

APPEAL from a judgment for the plaintiffs, in the Twenty-first District Court, County of Plumas. CLOUGH, J.

J. S. Chapman, and *J. D. Goodwin*, for Appellants.

If the labor be done upon a building or tunnel, situate upon a mining claim, the person seeking to acquire a lien therefor must designate the amount performed upon each, otherwise his lien will be postponed to other liens. (Code Civ. Proc. § 1188; *McGreary* v. *Osborne*, 9 Cal. 119; *Selden* v. *Meeks*, 17 id. 128.)

W. W. Kellogg, for Respondents.

ROSS, J.:

The plaintiffs performed certain work for the defendant Bolyer, upon a dwelling-house situated on a certain mining claim, and also in and upon a tunnel, and other portions of the mining claim. For the amount due for the work so performed, the plaintiffs filed, in due time, their claim of lien, and brought the present action to enforce it. The defendants, Thompson and Kellogg, to whom Bolyer executed a mortgage upon the premises after the filing of the laborers' claim of lien, appeal from the judgment of the Court below foreclosing the latter, on the ground that inasmuch as the claim of lien filed by the plaintiffs did not designate the amount and value of the work performed upon the dwelling-house, and the amount and value of that performed upon the tunnel, and other portions of the mining claim, the lien of the plaintiffs should have been postponed to the appellants' mortgage, by virtue of § 1188 of the Code of Civil Procedure, which reads as follows: "In every case in which one claim is filed against two or more buildings, mining claims,

or other improvements owned by the same person, the person filing such claim must at the same time designate the amount due to him on each of such buildings, mining claims, or other improvements, otherwise the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens, by judgment, mortgage, or otherwise, upon either of such buildings, or other improvements, or upon the land upon which the same are situated.

We think appellants do not correctly construe this section. It plainly applies only to cases in which one claim is filed against two or more *separate and distinct* "buildings, mining claims, or other improvements owned by the same person," and not to a case where, as here, all of the work was performed upon one and the same piece of property, although upon different portions of it.

Judgment and order affirmed.

McKINSTRY, J., and McKEE, J., concurred.

[No. 6,455.—Department No. 1.]

THE PEOPLE *v.* MAHONEY.

ASSESSMENT—DESCRIPTION—TAX SUIT.—A description sufficiently certain to convey land, between man and man, and which, if contained in an agreement to convey, would authorize a Court of Equity to decree a specific execution, may not answer in a proceeding to enforce the collection of a tax. In the latter case the description must be certain of itself, and not such as to require evidence *aliunde* to render it certain. *Held*, accordingly, that an assessment, one of the calls of which was, "* * * north by the lands of James Reagan *and others*," was void; and so *held*, also, with reference to an assessment, which described the land as "bounded * * * south by the lands of Felton and Patterson."

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Sixth District Court, County of Sacramento. DENSON, J.

Geo. Cadwalader, for Appellant.

The description in the assessment is vague, uncertain, and unintelligible, and the assessment therefore void. (*Ferris* v.

Coover, 10 Cal. 632; *Kelsey* v. *Abbott*, 13 id. 609; Blackwell on Tax Titles, 124; *Tallman* v. *White*, 2 Comst. 70; *Perkins' Lessee* v. *Dibble*, 10 Ohio, 433; *Dike* v. *Lewis*, 4 Denio, 238; *Keane* v. *Cannovan*, 21 Cal. 302; *Hannel* v. *Smith*, 15 Ohio, 134; *Richardson* v. *State*, 5 Blackf. 51; *Brown* v. *Dinsmoor*, 3 N. H. 103; *Bank of Utica* v. *Mersereau*, 3 Barb. Ch. 528; *Tripp* v. *Ide*, 3 R. I. 51; *Amberg* v. *Rogers*, 9 Mich. 332; *Orton* v. *Noonan*, 23 Wis. 102; *Curtis* v. *Supervisors*, 22 id. 167; *Yenda* v. *Wheeler*, 9 Tex. 408; *Lafferty's Lessee* v. *Byers*, 5 Ohio, 458; *Lessees of Massie's Heirs* v. *Long*, 2 id. 287; *Stewart* v. *Allen*, 13 Mich. 641; *Douglas* v. *Dangerfield*, 10 Ohio, 152; *People* v. *Pico*, 20 Cal. 595; *People* v. *Mariposa Co.* 31 id. 196; *Lachman* v. *Clark*, 14 id. 131; *Kelsey* v. *Abbott*, 13 id. 609; *People* v. *Cone*, 48 id. 427; *People* v. *Hyde*, id. 431; *San Francisco* v. *Quackenbush*, 53 id. 52; *Grimm* v. *O'Connell*, 54 id. 522; *Huntington* v. *C. P. R. R. Co.* 2 Sawy. 503.)

P. Dunlap, for Respondent.

The tax was properly levied, and is legal. (*People* v. *Latham*, 52 Cal. 601.)

Ross, J.:

The motion to dismiss the appeal was virtually passed upon, and was denied by our predecessors.

The only question upon the merits of the cause relates to the sufficiency of the description of the property assessed, which is as follows: "1,013.86 acres of land, being a portion of the San Pedro Rancho, bounded as follows: North, by the lands of James Regan and others; east, by the line of the San Pedro Rancho; south, by the Pacific Ocean; and west, by the lands of Richard Tobin. Also 15 acres of land, being a portion of the San Pedro Rancho, bounded on the north by the lands of Richard Tobin; south, by the lands of Felton and Patterson; west, by the Pacific Ocean; east, by the lands of Richard Tobin."

The statute, in force at the time the assessment in question was made, required that land should be assessed "by township,

range, section, or fractional section; and, when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, locality, and the improvements thereon."

It is hardly necessary to say that tax proceedings are *in invitum*, and to be valid, must be in strict accordance with the statute. It may be conceded that the description here in question would be good in a deed, or agreement between private persons, but that is not the test of sufficiency in a case of this nature. In Blackwell on Tax Titles, page 124, it is said: "A description sufficiently certain to convey land between man and man, and which, if contained in an agreement to convey, would authorize a Court of Equity to decree a specific execution, will not answer in the proceedings to enforce the collection of a tax. In the case of private transactions, the courts, in construing the document, endeavor to collect the intention of the parties, and give that intention effect. If a latent ambiguity exists in the description, parol evidence is resorted to for the purpose of explaining it, and giving to the intention of the parties complete operation; and when the estate intended to be conveyed is sufficiently described in the deed or other writing, the addition of a circumstance, false or mistaken, will be rejected as surplusage in order to carry that intention into effect. But in these tax proceedings the owner of the estate has nothing to do; he intends nothing. The government is acting, through its agents, in hostility to him, and with the view of enforcing the collection of a tax from him."

In *Keane* v. *Cannovan*, 21 Cal. 302, the Court quoted with approval the rule as stated by Blackwell, and said: "It is not sufficient that a similar description, in a contract or conveyance between individuals, might be shown by parol evidence to have been intended for particular premises. The description must be certain *of itself*, and not such as to require evidence *aliunde* to render it certain. * * * Certainty in the description is required to apprise the owner that his property is advertised for sale, and to enable him to prevent the sale by the payment of the taxes thereon, and to impart information to bidders of the actual extent and location of the premises to be sold. All subsequent proceedings depend upon this certainty. An inaccurate

or an uncertain description defeats every step subsequently taken, and, as we have already said, the uncertainty cannot be cured by evidence *aliunde*." So, in *People* v. *Cone*, 48 Cal. 429, in speaking of the assessment there in question, the Court said: "The assessment sought to be enforced in this action is void on its face. It describes by metes and bounds a large tract of land, as that which is assessed, but excepts from the assessment several parts of the larger tract which had been previously conveyed; and the excepted portions are not described by metes and bounds, nor in any manner, except by a reference to the unrecorded deeds. It is impossible to ascertain from the assessment, on its face, what particular lands were intended to be assessed, and what excepted. In order to determine with any reasonable certainty the particular tract described, it would be necessary to make a laborious search of the records, and possibly to invoke the aid of a surveyor. The deeds referred to in the assessment might prove, on examination, to be so vague in the descriptive calls as to leave it doubtful what lands they include. * * * The statute requires that the description, either by common designation or name, or by metes and bounds, shall appear on the face of the assessment roll, so that by inspecting it the owner and all other persons may know what particular land is assessed. This assessment is void, for a failure to comply with the statute in this respect."

In the assessment under consideration, the first piece of property is described as being bounded "on the north by the lands of James Regan *and others*." A more uncertain and indefinite boundary than this can scarcely be conceived. Who the "others" are whose lands are said to bound the tract attempted to be assessed does not appear upon the face of the assessment, and extrinsic evidence, as we have seen, cannot be resorted to for the purpose of showing.

The south boundary of the second piece of property attempted to be assessed is but little, if any, more certain. Neither description is sufficient to constitute a valid assessment. (See authorities *ante*. Also, *People* v. *Pico*, 20 Cal. 595; *People* v. *Mariposa County*, 31 id. 196; *Kelsey* v. *Abbott*, 13 id. 609; *People* v. *Hyde*, 48 id. 431; *San Francisco* v. *Quackenbush*, 53 id. 52; *The Bank of Utica* v. *Mersereau*, 3 Barb. Ch. 528;

Perkins v. *Dibble*, 10 Ohio, 433; *Tripp* v. *Ide*, 3 R. I. 51; *Amberg* v. *Rogers*, 9 Mich. 332.)

Motion to dismiss the appeal denied. Judgment and order reversed, and cause remanded.

McKINSTRY, J., and McKEE, J., concurred.

[No. 6,874.—Department No. 2.]

PEOPLE *v.* REDINGER.

APPEARANCE — CRIMINAL LAW — ESCAPE — APPEAL — CONSTITUTIONAL LAW.— Under the provisions of the Constitution, and of the Penal Code, a person charged with crime can appear and defend only when in actual or constructive custody, and has no longer a right to appear by counsel, when he has escaped from custody and is at large. Accordingly, where a defendant, convicted of murder, appealed, and afterward escaped from jail, it was ordered that the appeal should stand dismissed, unless the defendant should return to custody within a time specified.

Motion to dismiss an appeal from a judgment of conviction, and from an order denying a new trial.

Attorney-General, for Respondent.

John C. Deuel, for Appellant.

It is not necessary to have the defendant before the Court in order to hear and determine the case on appeal. In the English Courts, at common law, the presence of a person indicted for a felony was required in the Appellate Court, in every stage of the proceedings. It was necessary for him to follow the record. But in the United States the personal appearance is not necessary to give jurisdiction. (Archbold's Crim. Prac. and Pleading, Waterman's notes, p. 724 of vol. 1.)

It may be admitted, for argument, that the appellant in this case is guilty of contempt, in not remaining in jail during the pendency of this appeal. But does it follow that his appeal shall be dismissed, and the death penalty inflicted in case he is captured, whether he was rightfully convicted or otherwise?

Is it not better, and more in harmony with our laws and the spirit of justice, to set aside the order for the hearing of the appeal in this case, and in all similar cases, and continue it indefinitely, or until it shall be affirmatively shown that the appellant has been recaptured, and is in the custody of the law? But if the appeal in this case be dismissed, and the defendant, or escaped person is recaptured, the Superior Court of Colusa County would order his execution, although his conviction may have been erroneous. Breaking jail is not by law punishable with death, yet, if the man is innocent, or was convicted of a crime against the evidence, his jail-breaking would be the cause of his suffering death in case of capture.

THORNTON, J.:

The defendant was indicted for the murder of one James King, was tried in the District Court of Colusa County, under this indictment, and on the 16th of December, 1879, convicted of murder in the first degree. The defendant moved for a new trial, which was denied. The Court, in due course, pronounced sentence of death by hanging. The defendant prosecuted an appeal to this Court, notice of the same having been served on the 9th of February, 1880, and the cause was here for argument at the session of May, 1880, held at the city of Sacramento.

When the cause was called for argument, the Attorney-General, (Hon. A. L. Hart) moved the Court for an order dismissing the appeal, on the ground that since the appeal was taken the defendant had escaped from jail, and was no longer in custody, to abide the sentence of the Court. This fact is certified to the Court by the affidavit of John M. Steele, the Sheriff of the county aforesaid, in whose custody the prisoner had been since the conviction and sentence above mentioned, who deposes under oath that the defendant, by stratagem and force, on the 5th day of April last, escaped from the jail aforesaid, and was then at large. The affidavit bears date the 19th day of May, 1880. Of the escape there is no denial.

The question is one of interest and importance, and is new in this State—no case decided by any of its courts having been produced to us. Several cases were called to our attention, on

the argument of this motion, and a reply has been made to the argument by John C. Deuel, Esq., on behalf of defendant, who, we are informed, was authorized to appear in this Court as defendant's counsel. An objection was taken by the Attorney-General to any one being heard for the defendant, on the ground that this Court ought not to recognize any one as counsel for him, after he had voluntarily withdrawn himself from the jurisdiction of this Court, and the Court in which the conviction was had and sentence pronounced. However, a brief was allowed to be filed on behalf of defendant, which has been since done.

In discussing the motion, several cases were brought to our notice by the Attorney-General. We have examined these cases, and others not cited in the argument.

The earliest decision bearing on the point is in an anonymous case in Maine, (See 31 Me. 592) decided in 1850. It is thus reported: "A defendant had been tried and convicted upon an indictment for an aggravated offense. He excepted, and was committed for want of sureties to appear at the law term, at which the exceptions were to be heard. Meanwhile, he escaped. His counsel proposed to argue the exceptions. But the Court declined to hear the case until the defendant should be again in custody."

Sherman v. *Commonwealth* was decided by the Virginia Court of Appeals in 1858. (See 14 Gratt. 677.) In this case Sherman was convicted of a felony, and was sentenced to six years imprisonment in the penitentiary. He obtained a writ of error from the Court of Appeals, which was directed to operate as a *supersedeas* to the judgment. While it was pending in the Appellate Court, Sherman broke jail and absconded. The Attorney-General moved the Court for a rule upon the prisoner to show cause why the Court should not set aside the *supersedeas*, or postpone the hearing of the cause until the prisoner should return to the proper custody. This order was made, and the motion was afterward argued on behalf of the Commonwealth, and the plaintiff in error. The Court adjudged that so much of the order awarding the writ of error as directed it to operate as a *supersedeas* be discharged, and further ordered that the writ of error be dismissed on the 1st of May next, (1859,) unless it should be made to appear to the Court on or before the

day above named that the plaintiff in error is in the custody of the proper officers of the law. This judgment was afterward approved by the same Court in *Leftwich's Case*, in which defendant had been convicted of a felony. (See 20 Gratt. p. 723, decided in 1870.)

The case cited from Massachusetts (*Commonw.* v. *Andrews*, 97 Mass. 543,) was decided in 1867. Andrews was convicted of receiving stolen property. He alleged exceptions, which were allowed, and was held in jail to prosecute. When the case was called in the Supreme Court, the Attorney-General suggested that the defendant had broken jail, and was at large, and asked that he should be defaulted, and the exceptions overruled without argument.

The Court heard argument on the motion by the counsel for defendant, who stated (as appears from the report) the points in his behalf with force and clearness, and we would infer from what is stated in the report, that the motion was elaborately argued by the counsel who spoke for the defendant. The Court granted the motion. We insert here the brief opinion:

"The defendant, by escaping from jail, where he was held for the purpose of prosecuting these exceptions and abiding the judgment of the Court thereon, has voluntarily withdrawn himself from the jurisdiction of the Court. He is not present in person, nor can he be heard by attorney. A hearing would avail nothing. If a new trial should be ordered, he is not here to answer further; if the exceptions are overruled, a sentence cannot be pronounced and executed upon him. The Attorney-General has a right to ask that he should be present to receive the judgment of the Court. (1 Chit. Crim. Law, 663; *Rex* v. *Caudwell*, 17 Q. B. 503.)

"So far as the defendant has any right to be heard under the Constitution, he must be deemed to have waived it by escaping from custody, and failing to appear and prosecute his exceptions in person, according to the order of the Court under which he was committed. Defendant defaulted. Exceptions overruled."

The People v. *Genet*, 59 N. Y. 80, (1874) is also cited. In this case, the defendant had been convicted of a felony, and upon this conviction was committed to custody to await sentence

pending an application for the settlement of a bill of exceptions. When this bill was presented for settlement, the Court declined to settle it, on the ground that the defendant had, since the conviction, escaped from custody, had absconded, and was then at large. An application was made to the Supreme Court for a mandamus to compel the trial court to settle and seal the bill of exceptions. The Supreme Court denied the application, and the matter was brought on appeal before the Court of Appeals. This Court affirmed the order of the Supreme Court.

The Court of Appeals held it essential to any step, on behalf of a person charged with felony, after indictment found, that he should be in actual custody by being in jail, or constructively, by being let to bail. (59 N. Y. 81.)

The Court, per Johnson, J., said: "The whole theory of criminal proceedings is based upon the idea of the defendant being in the power and under the control of the Court, in his person. While the Constitution and the statute provide him with counsel, and the statute gives the right of appearance by attorney in civil cases, they are silent in respect to the representation of persons charged with felony by means of an attorney; and in regard to those charged with lesser offenses, the statutes permit them to be tried in their absence from court only on the appearance of an attorney duly authorized for that purpose. This authority, it has been held, must be special, and distinctly authorize the proceedings. (*People* v. *Petry*, 2 Hilt. 525; *People* v. *Wilkes*, 5 How. Pr. 105.) Even in the absence of statutory regulations, this rule has been enforced in the courts of the United States. (*United States* v. *Mayo*, 1 Curt. 433.) In criminal cases, there is no equivalent for the technical appearance by attorney of defendant in civil cases, except the being in actual or constructive custody. When a person charged with felony has escaped out of custody, no order or judgment, if any should be made, can be enforced against him, and courts will not give their time to proceedings which, for their effectiveness, must depend upon the consent of the person charged with crime." The opinion ends with this remark: "We think they" (referring to the statutes of New York giving to defendant a right to make a bill of exceptions) "do not require the courts to encourage escapes and facilitate the evasion of the

justice of the State, by extending to escaped convicts the means of reviewing their convictions."

In *Smith* v. *The United States*, 94 U. S. 97, (1876) the plaintiff in error had been convicted of some offense, (the report does not state the offense) and had sued out a writ of error to the United States Supreme Court to have the conviction reversed. Afterward he escaped from custody. The cause was docketed in the Supreme Court, December 29th, 1870. It had been continued at every term up to the time of the decision, for the reason that no one had appeared to represent the plaintiff in error. At the October term, 1876, the Court, on motion, dismissed the writ for want of prosecution, but reinstated it, on motion of counsel for the plaintiff, who moved to have it set down for argument. The Court denied the motion, and ordered that, unless the plaintiff in error submitted himself to the jurisdiction of the Court below, on or before the first day of the next term of the Court, the cause is to be left off the docket after that time.

The Court held in this case that it was within its discretion to refuse to hear a criminal case in error, unless the convicted party suing out the writ is where he can be made to respond to any judgment it might render. It thus declared it, per Waite, C. J.: "In this case, it is admitted that the plaintiff in error has escaped, and is not within the control of the Court below, either actually by being in custody, or constructively by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it, and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may be a moot case." (94 U. S. 97.)

In the *Queen* v. *Caudwell*, 17 Q. B. 503, (November, 1851) the defendant had been convicted of perjury, and sentenced to seven years' transportation. Pigott, for the defendant, was about to move for a new trial. It appeared that the defendant was absent. Lord Campbell, C. J., said: "The defendant must be in Court." Erle, J., concurred, and mentioned a like ruling by Lord Denman in a case where he (Erle) was for the defendant. Lord Campbell added: "This is peculiarly a case where the rule ought to be enforced, because the sentence has

been passed on him, and is evaded by his absence; when he appears, you may renew your motion." He referred to *Rex* v. *De Berenger*, 3 Maule & S. 67.

The motion was not heard, on the ground that the defendant was not forthcoming to meet his sentence. (Campbell, C. J.; Patterson and Earl, JJ., concurring.)

See also the *Queen* v. *Chichester*, 17 Q. B. 503, (November 24th, 1851) where, on motion for judgment against defendant, who had suffered judgment to go by default on an indictment for nuisance, and without *laches* of the prosecution, the defendant having gone out of reach before he could be served with notice to appear for judgment, the Court refused to pass sentence in his absence, although it appeared that the removal of the nuisance, which was to a public navigation, was important, and that the judgment of the Court was wanted to authorize the abating it. The Court held that the remedy was by process of outlawry.

In the case under consideration, has the defendant waived the right to have his case considered and determined? This was held in so many words in the case from Massachusetts, (*Commonw.* v. *Andrews*, *ut supra*) and the same may be regarded as the rule laid down and acted on in the Virginia cases, (*Sherman's Case* and *Leftwich's Case*, *ut supra*.) The determination under the facts here presented, not to hear the cases, was considered within the discretion of the Court—the discretion to be exercised to be a judicial discretion within limits defined by law. In *Genet's Case*, 59 N. Y. 80, the right to have a bill of exceptions settled was held not to exist on behalf of an escaped convict. In the case in Maine, (31st id.) the Court refused to hear the argument. And in the case from New York (59th id.) the right to be represented by counsel guaranteed both by the Constitution and statute to defendants in cases of felony, is held not to exist when the defendant is not actually or constructively in custody, so that the sentence of the Court can be enforced when pronounced. An exception to that rule is referred to in the opinion, as to offenses less than felony.

The provision of the Constitution in this State, both in the first Constitution and that recently adopted, as regards this right, is "*to appear and defend in person, and with counsel.*"

The former Constitution had appended to this provision "as in civil actions." That is omitted in the instrument of 1879. The language is suggestive, and indicates that the party charged is not allowed to appear and defend *by* counsel, but *with counsel*—the person acting as counsel to be present with the defendant, and not without him. In these words it seems as if the power to appear and defend, at least in a case amounting to felony, does not exist in the counsel at all in the absence of the defendant.

This view seems to be sustained by the statute of this State, and to be derived from a history of the law regarding counsel in criminal cases.

The history of the law as regards capital cases will be found in Blackstone's Commentaries. (See Book 4, 355–6.) This author seems to doubt whether it was not allowed by the ancient law of England, and cites the Mirror, chap. 3, § 1. In a note it is said that the right of counsel to plead for them was first denied to prisoners by a law of Henry I, chap. 47–8, which is construed as an erroneous interpretation of the law. However, this author states it as a settled rule at common law, that no prisoner should be allowed a counsel upon his trial on the general issue in any capital crime, unless some point of law arose which was proper to be debated. This denial was on the ground that the judge was counsel for the prisoner—a right of but little worth when a Jeffries or a Scroggs presided. The privilege was only accorded in the case of state criminals by the statute of 7 William III, chap. 3. (Proffatt Jury Trial, § 205.) This statute applied to all cases of such high treason as worked corruption of the blood, misprision of treason, except treason in counterfeiting the king's coin or seal, and such prisoners were allowed to make their full defense by counsel, not exceeding two, to be named by the prisoner, and appointed by court or judge. The same indulgence was extended by statute 20 George III, chap. 30, to Parliamentary impeachments for high treason, "which," says Blackstone, "were excepted in the former act." (4 Bl. Com. 356.)

Prisoners under a capital charge, whether for treason or felony, upon issues which did not turn on the question of guilty or not guilty, but on collateral facts, always were entitled to

the full assistance of counsel. (Fost. 42, 232; Chitty's note on page above cited from Bl. Com.)

In misdemeanors the defendant was always allowed counsel as in civil actions. (4 Bl. Com. p. 356.) In all cases of felony, defendants, by statutes 6 and 7 William IV, chap. 114, § 11, are allowed counsel.

It will be observed from the above that Blackstone refers to *prisoners* as being allowed counsel to appear and defend. He nowhere speaks of any such allowance to persons not in custody.

How far is the right secured to persons convicted or charged with public offenses, by the statute law of this State? (See §§ 858, 859, 987, 1093, 1095, 1254 of the Penal Code.)

It is apparent from an examination of the above sections that this right is confined to persons charged with a public offense, only when in custody. In fact, courts have no jurisdiction over persons charged with crime, unless in custody actual or constructive. It would be a farce to proceed in a criminal cause, unless the Court had control over the person charged, so that its judgment might be made effective. It is true that an indictment may be found against one not in custody, but steps are directed to be taken in such case to secure his person. (Pen. Code, §§ 945, 979–984.) And unless an arrest is effected, the cause can proceed no further. The defendant is arraigned in person, and pleads in person, (§ 977 Pen. Code) unless in case of misdemeanor. (Id.) Every plea must be oral. (Pen. Code, § 1017.)

By § 1253 of the Penal Code, it is provided, as to criminal causes, that "the judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear"; and by § 1255, that "the defendant need not personally appear in the Appellate Court."

It may be urged that, inasmuch as the defendant need not personally appear in the Appellate Court, (§ 1255 Pen. Code, *ut supra*) he has a right to appear by counsel, whether he is in custody or not. For the reasons here given, sustained by the cases cited, we think the defendant has no longer a right to appear by counsel, when he has escaped from custody, until he has returned into custody. By breaking jail and escaping, he had waived the right to have counsel appear for him. (*Commonw.*

v. *Andrews*, 97 Mass. *ut supra.*) In fact, his right to constitute counsel and invest him with authority no longer exists while his absence from custody continues.

We think it best in view of all the circumstances to direct that the motion to dismiss at once be denied; and, although it is unlikely that he will ever surrender himself into custody, it is ordered that the appeal herein stand dismissed, unless the defendant shall, before the first Monday of May, 1881, return to the custody of the proper officers of the law. (See the orders in *Sherman's Case*, 14 Gratt. 677; *Leftwich's Case*, 20 id. 716; and *Smith's Case*, 94 U. S. 97.)

MYRICK, J., and SHARPSTEIN, J., concurred.

[No. 6,480.—Department No. 1.]

BOEDEFELD v. REED ET AL.

INSOLVENT ACT—BANKRUPT ACT—CONSTRUCTION OF CONTRACT.—The operation of the Insolvent Law was suspended by the Bankrupt Act, in the sense that no proceeding could be commenced for a discharge under it, while a general bankrupt law existed; but, upon the repeal of the Bankrupt Act, the Insolvent Law revived, and came again into operation, as if it had never been suspended; and its provisions apply as well to indebtedness contracted while it was suspended, as to indebtedness contracted after it again came into operation.

APPEAL from a judgment for the plaintiff, in the Tenth District Court, County of Colusa. KEYSER, J.

A. L. Hart, for Appellant.

The effect of the passage of a Bankrupt Law by Congress cannot be construed to repeal or suspend the vital force of a State enactment. The only effect is to suspend the power of the State to enforce its Insolvent Law; and to create in the Federal Courts an exclusive jurisdiction. It follows that a debt, contracted while the national Bankrupt Act was in force, may be discharged under the Insolvent Act, upon its revival. (3 Pars. on Cont. 446; *Ward* v. *Proctor*, 7 Met. 321; *Austin* v. *Calverly*, 10 id. 332.)

John T. Harrington, for Respondent.

During the existence of the Bankrupt Act, the State Insolvent Law was wholly suspended. (*Martin* v. *Berry*, 37 Cal. 210.) Citizens of the same State, entering into contracts, are to be understood as making them with reference to existing laws (*Mather* v. *Bush*, 16 John. 232; *Blanchard* v. *Russell*, 13 Mass. 16; *Edwards* v. *Kearzey*, 96 U. S. 595); and it is only upon this principle that the constitutionality of the law is maintained. It would, therefore, be a forced construction which would give to a law that is suspended, but afterward revived, an equal import with a law subsisting and in force at the time of the contract

MCKINSTRY, J.:

The indebtedness set forth in the complaint was all contracted before the first day of September, 1878—the date of the repeal of the Bankrupt Law of the United States.

The answer avers that the defendants have been discharged from all their indebtedness, under the provisions of the State Insolvent Law, and contains a history of the proceedings by which that discharge was procured, from the application to the final discharge.

The case was submitted to the District Court, on the pleadings, upon motion of plaintiff, and the Court rendered its judgment in favor of plaintiff, holding that indebtedness incurred before the first day of September, 1878, could not be discharged under the State law.

The point made by counsel for the respondent is, that the State law, in relation to insolvent debtors, was suspended by the national Bankrupt Act, and that to construe the State law in such a manner as to authorize the discharge under it of indebtedness incurred during its suspension, would be impairing the obligation of contracts, within the meaning of the inhibition upon that subject, which is contained in the Federal Constitution.

The United States and the several States have a concurrent power to enact a bankrupt law or an insolvent law. "Congress shall have power * * to establish * * uniform laws on the

subject of bankruptcies, throughout the United States." (Const. U. S. art. i, § 8.) There can be no doubt that, so far as State insolvent laws prevent, or even impede, the operation of a United States bankrupt law, they must yield, in order that it may fully accomplish its object of establishing a uniform system throughout the United States. (*Ex parte Giegenfass*, 2 Ired.) It may be admitted, also, that a United States bankrupt law "suspends the operation" of a State insolvent law. This view is probably sufficiently sustained by the consideration that any proceedings taken under the State law, might, and almost necessarily must, interfere with the enforcement of the more general statute of the United States. The meaning of the expression of Chief Justice Marshall, (in *Sturgis* v. *Crowninshield*, 4 Wheat. 122,) "the *right* of the States *to pass* a bankrupt law is suspended by the enactment by Congress of a general bankrupt law," is plain enough. The meaning of the phrase, "a bankrupt act *suspends the operation* of a State insolvent law," is explained by the cases in which a like phrase is employed. The passage of a law of the United States, providing for a uniform system for the relief of bankrupts, does not *repeal*, the repeal of the law providing the uniform system does not *re-enact*, the State insolvent law. Such was not the meaning of the Supreme Court of Massachusetts, in *Judd* v. *Ives*, 4 Met. 401, where it was said: "The Act of Congress * * * does suspend the operation of the law of this Commonwealth. * * But we are, nevertheless, of the opinion that this consequence is limited to cases instituted under the insolvent laws, subsequent to the period when the Bankrupt Law went into operation; and that it cannot supersede or suspend proceedings rightfully commenced under the Insolvent Act, prior to the time of its going into operation." In the subsequent case, *Austin* v. *Caverly*, 10 Met. 332, the same Court held that a debt founded on a contract, made *while the Insolvent Act was suspended* by the Bankrupt Law, could be discharged under the provisions of that act, after it came into *renewed operation*. (See also, *Atkins* v. *Spear*, 8 Met. 491.)

A law may subsist, although any or all persons be prohibited for a time from taking advantage of its benefits. The operation of the Insolvent Law was suspended, in the sense that no pro-

ceeding could be commenced for a discharge under it while a general bankrupt law existed. The moment the law could be resorted to by any one, it could be resorted to by all, to whom, by its letter, its benefits were extended. The statute "for the relief of insolvent debtors" (Statutes 1852, p. 69) declares: "*Every* insolvent may be discharged from his debts." Defendant comes plainly within this provision. If the Insolvent Law "revived," or came again "into operation," (whatever the form of expression) by the repeal of the Bankrupt Law of the United States, we must construe it as if it had never been suspended, so far as proceedings initiated after the suspension ceased are concerned. No person could commence proceedings for a discharge while the Insolvent Law was suspended—this, and nothing more.

Judgment reversed, and cause remanded.

ROSS, J., and MCKEE, J., concurred.

[No. 6,562.—Department No. 1.]

IN RE BAKER & HAMILTON.

INSOLVENCY—PARTNERSHIP—CONSTRUCTION OF STATUTE.—Neither the Insolvency Act of May 4th, 1852, or the Supplementary Act of March 31st, 1876, apply to partnerships.

APPEAL from a judgment sustaining a demurrer to a petition in insolvency, in the County Court of Yolo County. BUSH, J.

George Cadwalader, for Appellant.

In the word "person," as used in the law, is necessarily included a partnership composed of persons.

In Louisiana, the words "debtor" and "insolvent debtor" are the terms used, yet there partnerships apply, and are adjudicated insolvents. (*Claiborne* v. *His Creditors*, 13 La. 281; *Stanton* v. *Cox's Synd.* 18 id. 508; *Morgan* v. *His Creditors*, 8 Martin N. S. 600; *Ward* v. *Brandt*, 11 Martin, 331; *Tyler* v. *His Creditors*, 9 Rob. 372.)

In the voluntary and involuntary sections of the U. S. Bank

rupt Law, the term used is "any person"; yet, under this phrase, partners apply jointly, and are adjudicated bankrupts jointly. (§§ 5014, 5021, Rev. Stat.; Bump on Bank. p. 1.)

C. P. Sprague, for Respondents.

The act has no application to partnerships. (*Meyer* v. *Kohlman*, 8 Cal. 46.)

Ross, J.:

This proceeding was commenced under the act approved March 31st, 1876, entitled "An Act supplementary to an act entitled an 'Act for the relief of Insolvent Debtors and protection of Creditors,' approved May 4th, 1852, and the acts amendatory thereof and supplemental thereto," by three of the creditors of the partnership of Huston Brothers, holding the requisite amount of indebtedness, praying that they be adjudged insolvent, and be required to surrender their property for the benefit of their creditors. The Court below held that the act in question, commonly known as the Involuntary Insolvent Act, did not apply to partnerships, and that Huston Brothers could not be adjudged insolvent under its provisions. Counsel for appellants contends, with much force, that the language of the act is broad enough to include partners as well as individuals, and if the question stood as an original proposition, we are not prepared to say we would not agree with him. But the language of the Act of March 31st, 1876, so far as the question under consideration is concerned, is substantially the same as that of the Act of 1852, and it was held here at an early day—in the case of *Meyer* v. *Kohlman*, 8 Cal. 44—that, under the provisions of the Act of 1852, there was no authority for the application of partners. This was the construction placed by this Court on that act as long ago as 1857, and has never been changed. We must take it for granted that, at the time the Involuntary Act of 1876 was passed, the Legislature knew the construction which had been placed on the Act of 1852. With this knowledge it passed the Involuntary Act, containing, as already said, substantially the same provision, so far as this question is concerned, as is found in the original act.

This was a legislative adoption of the known construction of that provision. (*Hyatt* v. *Allen*, 54 Cal. 353; *Taylor* v. *Delaney*, 2 Caines' Cases, 150; *Duramus* v. *Harrison*, 26 Ala. 326; *Yates' Case*, 4 Johns. 358.)

For these reasons, we think the provisions of the Act of 1876 should be held not to apply to partnerships. The Legislature, however, at its last session, made provision for such cases. (Statutes of 1880, p. 90.)

Judgment affirmed.

McKINSTRY, J., and McKEE, J., concurred.

[No. 6,067.—Department No. 1.]

THE PEOPLE *v.* GARDNER ET AL.

OFFICIAL BOND — SURVEYOR-GENERAL — REGISTER.— In an action upon the official bond of G. as Surveyor-General, (during the years 1871 to 1875) *held*, that neither G. nor his sureties were liable for his malfeasance in the office of Register.

ID.— ID.— *Held further*, that it was the duty of the Surveyor, under the Political Code, and also under the law existing before the adoption of the Codes, to collect a fee of $5 from each applicant for land, and that his failure to do so was a non-performance of duty, and a breach of his official bond, for which he and his sureties were liable.

APPEAL from a judgment for the defendants, and from an order denying a new trial, in the Sixth District Court, County of Sacramento. DENSON, J.

The Attorney-General, and *P. Dunlap*, for Appellant.

A. P. Catlin, and *Henry Edgerton*, for Respondents.

McKEE, J.:

Robert Gardner, one of the defendants in this case, was elected Surveyor-General of the State, at the general election of 1874, and continued in office until the first Monday in December, 1875. Before entering upon the duties of his office, he took the oath of office and gave bond with the other defendants as sureties, in the sum of ten thousand dollars, conditioned as follows, to wit: "Now, therefore, if the said Robert Gardner shall well

and faithfully perform all the duties of his said office, as required by law, and shall pay over all moneys that may come into his hands in the pursuance of the requirements of the statutes of said State, and shall faithfully execute and perform all the duties of such office required by any law to be enacted subsequent to the execution of this bond, then this obligation to be void and of no effect; otherwise, to be and remain in full force and virtue."

For an alleged breach of this bond the action in hand was brought, and it is charged by the complaint in the action, that, during his term of office, there were fees of office amounting in the aggregate to the sum of $75,845.43, which the defendant Gardner failed and neglected to collect and account for to the State; and that those fees of office which he did collect for the use and benefit of the State, amounting in all to the sum of $76,620, he failed to disburse according to law for the benefit of the State, or to pay into the treasury of the State, but converted the same to his own use.

On the trial of the case, proof was made, by the "Application Books" in the Surveyor-General's office, that there had been filed during the term of office of defendant, 7,193 applications to purchase lands belonging to the State of California, the fees for filing 5,798 of which were paid to the Surveyor-General, and that upon 1,381 applications he had failed to collect the fees.

Evidence was also offered to show that contests were made before the Surveyor-General by opposing applicants for the purchase of State lands, and that he referred these contests to the District Courts by orders made and signed by him as Register of the State Land Office. About 200 of these orders were made in all. The greater number of them were made between December, 1871, and January, 1873, and the others between January, 1873, and December, 1875. Evidence was also offered to show that, during his term of office, the Surveyor-General had, as ex-officio Register of the State Land Office, issued 7,046 certificates of purchase of State lands, and upon final payment had prepared patents, on the surrender of the certificates; and the amount of fees which had been paid to him therefor, and for listing lands to the State, and for other services rendered by him in his capacity as Register. The Court rejected the evi-

dence, and when the plaintiff rested, nonsuited the plaintiff, upon the ground that it had not been proved that the defendant Gardner, as Surveyor-General, had misappropriated any moneys collected by him in his office.

We think that the Court did not err in excluding the evidence of acts done by the defendant Gardner, as Register of the State Land Office. Neither Gardner nor his sureties were liable upon the official bond of the Surveyor-General for malfeasance in the office of the Register, unless the acts of that office were part of the duties imposed upon the Surveyor-General, or were provided for by the bond given by him in his capacity as Surveyor-General. It was undoubtedly within the power of the Legislature to provide that duties required by law to be performed by the Register of the State Land Office should be performed by the Surveyor-General. If the Legislature had imposed these duties on the latter, he would have been bound to perform them, and for non-performance he and his sureties would have been liable, for they bound themselves for the faithful performance of all duties which may have been made the appropriate functions of the office, whether made such by laws enacted prior or subsequent to the execution of his official bond; or if the Legislature had provided that the bond given by the Surveyor-General should include the duties required of the Surveyor-General, and of the Register of the State Land Office, the sureties upon the bond of the former would be liable. But the Legislature made no such provision. When it created the two offices it made them separate and distinct. (Act of March 28th, 1868, Stat. of 1867–8, p. 507; Amended Act of 1879, p. 875.) The offices were so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace the obligations belonging to the other. (*People* v. *Edwards*, 9 Cal. 286.) They were distinct as though filled by different persons. The duties and obligations of the one were entirely independent of the duties and obligations of the other. Before 1873 no bond was required for the performance of the duties of the office of Register. Upon the adoption of the Code, the two offices were continued under the supervision and control of one officer, but the Surveyor-General as *ex-officio* Register was required to give an additional bond to that which he gave as Surveyor-General. (§ 502, Pen. Code.) For

any malfeasance in the Register's office, the sureties to his official bond are liable. The sureties to the bond of the Surveyor-General are liable only for the non-performance of such duties as have been imposed by law upon him and come within the scope of his office. But the law required him to discharge the duties relating to the public lands imposed upon him by title 8 of part 3 of the Political Code. (§ 483, Pen. Code.) In the distribution of duties to the two offices in relation to the management and sale of lands belonging to the State, the Legislature specially enjoined upon the Surveyor-General, as a duty appertaining to his office, to collect a fee of $5 from each applicant for land, and required him to make a report to the Governor of the State of the amount of fees received by him and the Register, and how the same were disposed of. Before the adoption of the Codes, this duty was also required of him. (§ 55, Act of March 28th, 1868; amended, April 4th, 1870; Stats. 1869-70, p. 876.) These fees were to be used in defraying the expense of procuring maps, records, documents, and extra assistance in the office of the Surveyor-General, or of the Register, and the balance, if any, was to be paid into the State treasury quarterly. (Stats. 1869–70, p. 876; § 3,574 Pol. Code.) The collection of these fees was a plain duty appertaining to the office of the Surveyor-General.

It is the duty of an officer to do what the law requires to be done in his office, for the law is to him a command which he must obey. If it prescribes the course which shall be taken, and the thing which must be done by any one in office, the officer cannot disregard it. A failure to obey the law, or a disregard of duty, is a non-performance of duty, and a breach of the official bond of the officer for which he and the sureties thereon are liable. When, therefore, the plaintiff had proved that the defendant Gardner, during his term of office, had failed to collect the fees on 1,281 applications to purchase land belonging to the State, and to account for the same as required by law, that proof should have been considered by the Court, and the Court erred in granting a nonsuit.

Order denying motion for a new trial reversed, and cause remanded.

ROSS, J., and MCKINSTRY, J., concurred.

[No. 7,152.—Department No. 1.]

NELSON *v.* McCLANAHAN.

CONTEST OF WILL—UNDUE INFLUENCE—EVIDENCE—RES GESTÆ.—Upon the contest of a will by one of two children of the testator who had been excluded from its provisions, the contestant introduced evidence tending to show that the testator executed the will under undue influence, and a witness of proponent in reply testified that by direction of the testator he made a draft of his will, and that upon reading it to him, the testator objected to the names of the contestant and the other excluded child, and said he would not have them in, which testimony was, upon the motion of contestant, stricken out. *Held*, that the declarations of the testator, if made, constituted part of the *res gestæ*, and that the Court erred in excluding them.

APPEAL from an order refusing probate of an alleged will, and from an order refusing a new trial, in the Probate Court of Colusa County. HATCH, J.

Hart & McKaig, for Appellant.

The facts stated by the witness Hallett were admissible as part of the *res gestæ*, as showing the directions of the testator to the person preparing his will, and as showing that the will was drawn and executed according to the wishes of the testator. (1 Redfield on Wills, 542; *Trimmir* v. *Bayne*, 7 Ves. 508, 518.)

J. C. Chadbourne, *Catlin & Hamburger*, for Respondent.

ROSS, J.:

Thomas M. McClanahan died June 26th, 1879. For many years prior to the 5th of December, 1876, he had lived with Catharine McClanahan without being married to her, and had by her four children—Samuel, Ellie, Jackson, and Lettie. On the 5th of December, 1876, he married the said Catharine, and on the next day she died. On the 30th of December, 1876, Thomas M. McClanahan executed a document acknowledging each of said children as his own, and declaring them to be legitimate, and that his marriage with Catherine was consummated to make them so.

On the 26th of November, 1877, he married the defendant and appellant *Ellen* McClanahan. September 21st, 1878, he made the will in controversy, by which one-half of his estate

was given to the defendant Ellen, and one-half to his two children Jackson, and Lettie. The defendant was nominated as executrix, and petitioned for the probate of the will. The daughter Ellie McClanahan, now Ellie Nelson, contested its probate, mainly upon the grounds that her father, at the time of executing the alleged will, was not of sound and disposing mind, and that he signed it under duress, menace, undue influence, and fraud. Issues were framed upon these questions, and submitted to a jury, before whom the case was tried. At the trial the contestant introduced a good deal of testimony tending to show that the deceased testator executed the instrument in question under undue influence. Upon the conclusion of the contestant's case, the proponent introduced, among other witnesses, Andrew Hallett, who, after testifying that, in response to a message, he attended the deceased for the purpose of drawing his will, said: "At that time I took a sheet of paper and pencil, and made a memorandum of what he wished to have done. I then went back to my office, two blocks distant, and made a rough sketch of a will, expressing in a rough way what I learned he wanted. I took it over to him, and read it to him, and he objected to some portion of this rough outline, as not being what he intended. Q. (by the proponent).—State what the portions were that he objected to? A.—In the rough sketch I made I inserted the names of four children. I am unable to say, or recall to recollection, how I learned the names of those four children—possibly from him, and possibly from a former will. When I went over to see him the second time I took the rough outline of this will and read it to him. He objected very positively to two of the names in the will which I had inserted there, and said he would not have those names in; that he would not give them anything. Those names were Samuel McClanahan, and Ellie Nelson." The contestant thereupon moved the Court "that the evidence as to objections made by deceased, and the names given, be stricken out, because not in the will, and they cannot be proven by parole." To which the proponent responded that the evidence was "offered as a part of the *res gestæ*, to show that the will is in conformity with the will of the testator." The Court granted the motion, and struck the testimony out—proponent excepting.

In this ruling there was error. The declarations, if made, constituted a part of the *res gestæ*. If true, they certainly tended to show not only that the deceased was competent to make a will, but also that he was not acting under undue influence. (1 Redfield on the Law of Wills, 3rd ed. pp. 553, 551, 542, and authorities there cited.) The credibility of the witness was a question for the jury, and the proponent undoubtedly had the right to have the testimony, thus excluded, submitted to them. The testimony was not offered, and of course was not admissible for the purpose of determining the construction or effect of the will. No such question was in issue, or could be considered in this proceeding. The error committed was not cured by the subsequent testimony of the witness.

Judgment and order reversed, and cause remanded for a new trial.

McKINSTRY, J., and McKEE, J., concurred.

[No. 6,700.—Department No. 1.]

ESTATE OF BOLAND.

APPEAL—PARTY AGGRIEVED—DEFINITION—ESTATES OF DECEASED PERSONS.—Upon an appeal from an order directing a resale of real property, which had been previously sold by the administratrix, and confirmed to the appellant as purchaser, *held*, that the appellant, though not an actual party to the proceedings in the Court below, was a party aggrieved, and entitled to appeal under §§ 969 and 938 of the Code of Civil Procedure.

ESTATES OF DECEASED PERSONS—SALE OF REAL ESTATE—PETITION—JURISDICTION.—A petition for the sale of real estate, whether under § 1530, or under § 1537, Code of Civil Procedure, must, in order to give the Court jurisdiction, set forth the *condition* of the property, and, if under the latter section, it must be verified.

ID.—ID.—ID.—Proceedings for the sale of real estate, in the Probate Court, are in the nature of an action, and the jurisdiction of the Probate Court depends absolutely on the sufficiency of the petition—in other words, upon its substantial compliance with the requirements of the Probate Law.

APPEAL from an order of the Probate Court of the County of Sierra, directing a resale of real property. HOWE, J.

Creed Haymond, *J. W. Turner*, *and Thos. Rutledge*, for Appellant.

The Probate Court had no power to vacate the order confirming the sale of real estate. (Code Civ. Proc. § 1554.) It was not necessary that the petition should be verified. (Code Civ. Proc. §§ 1529, 1530, 1533.) All the description contemplated or made necessary by the Code was given in the petition. (*Fitch* v. *Miller*, 20 Cal. 352.) Appellant is the party aggrieved by the order appealed from, and may appeal. (*Adams* v. *Woods*, 8 Cal. 314; § 933, Code Civ. Proc.; *Williams* v. *Gwyn*, 2 Saund. 40.)

F. D. Soward, and *Tubbs & Cole*, for Respondent.

The Court had no jurisdiction to make the first order of sale, as the petition failed to set forth the facts required by § 1537 of the Code of Civil Procedure. (*Pryor* v. *Downey*, 50 Cal. 383; *Haynes* v. *Meeks*, 20 id. 312; *Townsend* v. *Gordon*, 19 id. 189.) Even if the petition was sufficient, the Court rightly vacated the order. (Freeman on Judgments, §§ 98, 100; *Millspaugh* v. *McBride*, 7 Paige, 509; *Delaplaine* v. *Lawrence*, 10 id. 602.)

McKEE, J.:

This is an appeal from an order of the Probate Court of Sierra County, authorizing the administratrix of the estate of D. Boland, deceased, to resell certain real property of the estate, which had been formerly sold by the administratrix, and confirmed to the appellant as purchaser.

It is objected that the appellant was in no way a party to the order directing a resale, and cannot, therefore, appeal. An appeal may be taken by any party aggrieved, from an order of the Probate Court against or in favor of directing the partition, sale, or conveyance of real property. (§§ 969, 938, Code Civ. Proc.)

The appellant describes himself in his notice of appeal as "a purchaser who purchased and paid for the real estate of deceased, described in and confirmed to him by an order of the Probate Court, made and entered December 9th, 1878." As-

suming that he is a party aggrieved by the order from which he appeals, (*Adams* v. *Wood*, 8 Cal. 306; *Dennis* v. *T. M. W. Co.* 10 id. 369) and that the order itself is appealable, we find nothing in the transcript to indicate upon what the order was made, except it be the petition upon which the Court had acted in making the original order of sale. But the Probate Court had, on the 30th of December, 1878, vacated and annulled the decree of confirmation of the previous sale, the sale itself, of which the decree was confirmatory, and the order of sale upon which the sale had been made, upon the following grounds, as set forth in the annulling order, to wit:

"That the petition praying for an order of sale of said real property filed herein August 30th, 1878, *is not verified, and does not particularly describe, nor describe at all, the condition of the property sought to be sold.*

"That the condition of said property was not proved at the hearing had pursuant to said petition on October 5th, 1878; and that the condition of said property is not set forth in the order of sale made herein, October 5th, 1878, nor in the decree confirming said sales of real property made herein, December 9th, 1878.

"Wherefore, by reason of the last above recited facts and the premises, it appears that all the said proceedings are void in this, that the Court never acquired jurisdiction."

Neither the appellant nor any one else complained of this annulling order or decree. No appeal from it was taken by any one purporting to have been aggrieved by it. It stands in full force, unappealed from and unreversed; and if the grounds upon which it was made be correct, there was nothing in the application for a sale of the real property of the intestate which authorized the Court to order a sale, or a resale, of the property.

On looking into the record as it has been brought before us on this appeal, we find that the administratrix, in her petition filed August 30th, 1878, for an order of sale, described the real property of the estate as follows: "That the said inventory and appraisement on file contains a full description of all the real estate of which the intestate died seized, or in which he had any interest, or in which the said estate had acquired any interest;

and your petitioner, for a description of said real estate, hereby refers to said inventory, and makes the same a part of this petition; and that the condition and value of the respective portions of real estate are described in the said appraisement heretofore referred to, and made part of this petition."

There is neither inventory nor appraisement annexed to, or, in fact, made parts of the petition; but it appears, outside the petition, by the record in the statement on this appeal, "That on the 8th day of October, 1877, said administratrix made and duly returned an inventory and appraisement of all the estate of said deceased which had come into her possession and knowledge."

That from said inventory and appraisement it is made to appear that said deceased died possessed of the following real estate, to wit:

"Two and one-quarter interests in the Consolidated California Gold Mining Company, located at Table Rock, Sierra County, California, of the value of $506; also, one parcel of mining ground, known as F. Descombe's Claims, located on the west bank of the East Fork of Cañon Creek, Sierra County, California, and opposite the mouth of the South Fork of the aforesaid creek, of the value of $20; also, one ditch heading in the East Fork of Cañon Creek, and discharging in the above claims, of the value of $15; and one ditch heading in the South Fork of Cañon Creek, also discharging in the above mentioned claims, of the value of $15."

This is all of the inventory and appraisement. Of the property described therein, the Court ordered to be sold the following, as it is described in the decree of sale: "The following is the real estate hereby authorized to be sold, being situate in the County of Sierra, State of California, and described as follows, to wit:

"Two and one-fourth (2¼) interests in the mining claims known as the Consolidated California Gold Mining Company's Claims, located on the south side of Table Rock, about one and a half miles from Howland Flats; also, one parcel of mining ground known as Frank Descombe's Mining Claims."

Taking the petition and inventory together, the description of the property, as was held in *Stuart* v. *Allen*, 16 Cal. 473, is not

so defective as to render the sale void. But while the description may be considered sufficient, there is nothing in the petition, or the inventory and appraisement referred to therein, which indicates the condition of the mining interests, or of the mining company in which such interests are held, or of the mining claims. It does not appear whether they were worked or lying idle, whether they were sources of profit or loss to the estate. The petitioner alleges that a sale of all the property described in the inventory was necessary, because the personal property of the estate was insufficient to pay debts, family allowance, and estimated expenses of the administration. And the petition shows that the amount of the personal property of the estate which came into the hands of the administratrix "is the sum of, in goods, $1,600," and that the debts, family allowance, and expenses amount to $2,041. But if the mining interests or claims were yielding an income which was sufficient to make good the alleged deficiency in the personal estate, there would not have been any necessity for a sale of the real property. So long as there is a sufficiency of personal property in the hands of an administrator to pay the debts and expenses of an administration, a sale of the real property of an estate cannot be made. (*Haynes* v. *Meeks*, 20 Cal. 288.) Hence the necessity for setting forth in the petition the condition and situation of the real property. Section 1530 of the Code of Civil Procedure provides, "that the executor, administrator, or any heir-at-law, or creditor of the estate, any partner, or member of any mining company in which interests or shares are held or owned by the estate, may file in the Probate Court a petition in writing, setting forth the general facts of the estate, being then in due course of administration, and *particularly describing the mine, interest, or shares which it is desired to sell, and particularly the condition and situation of the mine or mining interests, or of the mining company in which such interests or shares are held*, and the grounds upon which the sale is asked to be made." And § 1537 of the same Code, under which the petition in this case seems to have been filed, provides that, "to obtain an order for the sale of real property, the executor or administrator must present a verified petition to the Probate Court, setting forth the amount of personal property that has

come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance; the debts, expenses, and charges of administration which have accrued or are likely to accrue; a general description of all the real property of which the decedent died seized, or in which he had any interest, and *the condition and value thereof*, and whether the same be community or separate property; the names of all the legatees and devisees, if any, and of the heirs of the decedent, so far as known to the petitioner." Under either of these sections the petition under consideration was defective, in failing to set forth the condition of the property. The Court, say the Supreme Court in *Estate of Smith*, 51 Cal. 563, should be informed by the petition of the condition of the property—that is, whether the property is improved or unimproved, productive or unproductive, occupied or vacant, and the like. Such information is necessary to enable the Court to intelligently exercise its judgment in the selection of the property of the estate which can be most advantageously sold.

Brought, as this petition evidently was, under § 1537, it is fatal to it that it was not verified. The verification of the petition, the description of the property, its condition, value, and character, are jurisdictional facts, which must affirmatively appear in a verified petition, before a Probate Court can make any valid order for a sale of the real property of an estate to pay debts. These are of the essence of the petition, without which it has no legal existence. The petition is the commencement of a distinct proceeding in the nature of an action; without it, the Court acquires no jurisdiction to order the sale, for the jurisdiction for that purpose depends upon the averments of such a petition. (*Fitch* v. *Miller*, 20 Cal. 385; *Spriggs' Estate*, id. 125.)

It has been repeatedly held, that the jurisdiction of the Probate Court depends absolutely on the sufficiency of the petition—in other words, on its substantial compliance with the requirements of the probate law. (*Fitch* v. *Miller*, *Haynes* v. *Meeks*, *supra*; *Pryor* v. *Downey*, 50 Cal. 388; *Estate of Smith*, *supra*.)

The appellant tacitly admits the validity of the order of the Probate Court in setting aside the sale and confirmation; for,

although all the rights which he claims as an alleged purchaser of the property depend upon the decree of sale and of confirmation, he took no appeal from the order of the Court disannulling them; and unless that order has been vacated and set aside, and the original decrees have been restored, the appellant is in no condition to require a conveyance; for, those decrees no longer existing of record, there is nothing upon which his claim of right to the property can be enforced, or upon which this Court could direct, as he has requested, the execution of a conveyance. Nor does there appear anything in the record before us to sustain the order appealed from for a resale. The record contains the original unverified petition, upon which the Court below acted in directing a sale of the property in the first instance. It does not appear that it was verified before making the second order for sale. If it was made upon an unverified petition, it would also, like the first, be void for want of jurisdiction.

The order of the Probate Court, made and entered March 1st, 1879, authorizing the administratrix of the estate to again sell the real property of the estate, is reversed, without costs to either party; and the cause is remanded to the Superior Court of Sierra County for further proceedings, with leave to the administratrix to petition for a sale of the real property *de novo*.

McKINSTRY, J., and ROSS, J., concurred.

[No. 6,728.—Department No. 1.]

LOWELL *v.* LOWELL.

APPEAL—UNDERTAKING.—An appeal from a judgment is well taken, if the notice is filed within the year, and the undertaking (though after the expiration of the year) within the period prescribed by the Code.

ID.—CASE COMMENTED UPON.—The case of *Holcomb* v. *Sawyer*, 51 Cal. 417, was decided to this effect on rehearing, and the original opinion was reported by mistake.

DIVORCE—PLEADING—ANSWER—DENIAL—HOMESTEAD.—In an action for divorce by a wife against her husband, the complaint alleged that certain land (the separate property of the latter) was dedicated as a homestead by a declaration filed and recorded by her, and that at the time of the declaration, the parties were residing on the land; and the answer denied the former but not the latter allegation. *Held*, that the denial of the ultimate fact was sufficient, and that a finding, that the wife, at the time of the dec-

laration, had abandoned her husband, and was not residing on the land, was within the issue.

ID.—SEPARATE PROPERTY—HUSBAND AND WIFE.—*Held further*, that the decree rightly adjudged the land to the defendant.

ID.—DESERTION—FORMER ADJUDICATION—ESTOPPEL.—A judgment, pleaded as an estoppel in this case, *held* not to be so.

ID.—ATTORNEY'S FEE.—The defendant filed a cross-complaint, alleging abandonment by the plaintiff, and judgment was rendered in his favor; but the judgment directed that he should pay money to the plaintiff for her attorney's fee. *Held*, not to be erroneous.

APPEAL by the plaintiff and defendant, from a judgment in the Sixth District Court, County of Sacramento. DENSON, J.

The allegations in the complaint, with reference to the homestead, are as follows:

"VI. That those parts of sections 6 and 7, etc.," * * * (describing the land) "are the homestead of plaintiff and defendant, and were dedicated as such by a declaration filed June 6th, 1873, by plaintiff, and recorded, etc.; * * * that plaintiff and defendant, at said last named date, were residing on said premises as their home."

The answer "denies that the piece of real estate described in said complaint was dedicated by a homestead filed by plaintiff on the 6th of June, 1873, or that the same was ever dedicated by said plaintiff as a homestead."

The Court finds (in finding 5) that the allegations of the complaint, with reference to the alleged homestead, are untrue; that the declaration was sufficient in form and substance, but was untrue in fact, in this, that plaintiff was not, at the time of making or filing the same, residing with defendant upon the land, but that she had left and abandoned her husband's home with the intention of making her home in Ireland.

The plaintiff, in answer to the cross-complaint, pleaded, as a bar, a judgment rendered in a prior action on the 25th day of September, 1877, in which the defendant had filed a cross-complaint, alleging abandonment by the plaintiff, commencing in May, 1873, and continued to the time of the filing of the cross-complaint, and in which the Court found that the plaintiff had not at any time deserted the defendant, and rendered judgment against him; and there was no finding as to this allegation.

A. C. Freeman, for Appellant (plaintiff).

The *fifth* finding is against the admissions of the pleadings. The sixth allegation of the plaintiff's complaint was not denied by defendant, except as to matters which the Court finds to be true. The answer does not deny that the plaintiff and defendant were both residing on the premises when the homestead declaration was filed. The Court, on September 25th, 1877, had decided that the plaintiff never had at any time deserted the defendant. Yet, in finding fifth, it finds a desertion June 6th, 1873, and on that account cancels the homestead declaration.

W. C. Van Fleet, *W. F. George*, and *J. H. McKune*, for Respondent (defendant).

The *ultimate* fact pleaded by the plaintiff, in the sixth paragraph of her complaint, is that the lands "are the homestead of plaintiff and defendant." The other allegations are merely as to *probative* facts, and are to be treated as surplusage. The *ultimate* fact is denied. (*Racouillat* v. *Rence*, 32 Cal. 450; *Marshall* v. *Shafter*, id. 176; *Grewell* v. *Walden*, 23 id. 165; *Miles & O'Brien* v. *McDermott*, 31 id. 271; *Willson* v. *Cleaveland*, 30 id. 192.) The plea of former adjudication is clearly insufficient. (*Vance* v. *Vance*, 17 Mc. 203; *Griffin* v. *Griffin*, 8 B. Mon. 120; *Milner* v. *Milner*, 2 Edw. Ch. 114; *Ferrier* v. *Ferrier*, 4 id. 296; *Hill* v. *Hill*, 10 Ala. 527.)

MCKINSTRY, J.:

These are cross-appeals, the plaintiff appealing from the whole judgment, and the defendant from that portion thereof which decrees the defendant to pay the sum of $100 to A. C. Freeman, attorney for plaintiff, for services rendered.

Defendant's counsel moved to dismiss the appeal of plaintiff, on the ground that the undertaking on appeal was not filed within one year after the judgment was entered.

An appeal is taken by filing and service of the notice, but it is effectual for no purpose until the undertaking is filed. The failure to file the undertaking within the time prescribed by the Code of Civil Procedure renders the notice nugatory, but if

filed within that time the appeal is well taken. (*Peran* v. *Monroe*, 1 Nev. 484; *McCreery* v. *Everding*, No. 5,046. See, also, *Holcomb* v. *Sawyer*, in which case a rehearing was granted, and the question decided as herein, but the original opinion in which was reported by mistake, at 51 Cal. 417.)

The action was brought by plaintiff to obtain a divorce from defendant, a partition of their homestead, for alimony, and for maintenance of her child, and to be let into possession of the homestead. Defendant, by way of cross-complaint, alleged desertion by plaintiff. The Court granted defendant a divorce from plaintiff, and decreed that the certificate of homestead be set aside and annulled, and that plaintiff have no interest in the homestead property.

1. The third denial of the answer is a denial of the material fact stated in the sixth allegation of plaintiff's complaint, to wit: That the real estate described therein was the homestead of the parties.

2. It is urged that inasmuch as the same Court, on the 25th day of September, 1875, had decided that the plaintiff had not deserted defendant, finding *five*, that plaintiff had deserted defendant June 6th, 1873, *is not sustained by the evidence.* The desertion alleged in the cross-complaint is of February, 1877. The Court (finding sixth) finds that on that day plaintiff willfully deserted defendant, and has ever since willfully deserted and lived apart from him, and refused to cohabit, etc. If the facts recited in finding fifth can be held to be the equivalent of a finding that a desertion by plaintiff commenced in 1878, and such finding cannot be upheld for the reason mentioned by plaintiff's counsel, still, the desertion beginning in February, 1877, may be maintained, notwithstanding the prior adjudication. Giving the utmost effect to the prior judgment, it was a finding that the desertion had not continued for the statutory period when the former action was commenced.

3. The answer alleges that the real property, described in the sixth allegation of plaintiff's complaint as a homestead, is the separate property of defendant. The decree properly provided for the preservation of the property to defendant.

The portion of the judgment directing the payment of money

to plaintiff's attorney is not erroneous. (Civ. Code, § 137; Code Civ. Proc. § 1049.)

Judgment affirmed.

McKEE, J., and ROSS, J., concurred.

[No. 6,617.—Department No. 1.]

BALL ET AL. *v.* KENFIELD.

OFFICER—SALARY.—The Act of April 1st, 1876, for the appointment of a State Land Commission, provides that the officers therein named "shall hold their office for the period of three years *from and after appointment by the Governor*," and that they shall, "within thirty days after their appointment," meet and qualify. *Held*, that the Commissioners were entitled to salary from the date of their *appointment*.

PETITION for writ of mandamus, to W. B. Brown, late Controller, for whom D. M. Kenfield, the present Controller, has been substituted.

The facts are stated in the opinion.

H. F. Crane, for the Plaintiff.

Jo. Hamilton and *Attorney-General*, for the Defendant.

McKINSTRY, J.:

The Act of April 1st, 1876, (Stat. 1875–6, p. 798) provides that within sixty days after its passage, the Governor shall appoint three suitable persons, etc., "who shall hold office for the period of three years from and after their *appointment* BY *the* Governor." The section requires that the Commissioners shall, "within thirty days *after* their appointment," meet, take an oath in writing faithfully to perform their duties, organize, and proceed to investigate, etc. The eighth section provides that each of the members of the commission shall be paid a salary of $200 per month.

Each of the members of the board received a commission from the Governor, May 29th, 1876, and on the 27th of June, following, the board met, qualified, and organized. They have been paid their salaries for eleven months, and the question here is whether they are entitled to their salaries for the month of June, 1876.

We see no difficulty in construing the provisions of the act according to the terms employed. The term of office commenced from the "appointment by the Governor," and that the qualification of the Commissioners was not intended to be included in the word "appointment," is apparent from the wording of the second section, which provides that the qualification shall take place after the appointment. Doubtless the Commissioners were not authorized to proceed with the investigations committed to their charge until they had qualified. But they were obliged, by the language of the act, to qualify within thirty days after their appointment, and their failure to qualify would have operated a vacation of their appointment; but when they did qualify, they became entitled to their salary from the date of the Governor's appointment. From the date of that appointment, the appointees were in office or they were not. The statute *says* that their office commenced with the appointment, and further, that their qualification was a different and subsequent thing from their appointment. The case would be different if the law in terms required them to take the oath before their term should commence. We are quite convinced that petitioners were "holding the office" from the date of the Governor's appointment. This would not sometimes be the case. As was said by Field, J. (*People* v. *Whitman*, 10 Cal. 47): "To the complete investiture of an office, the acts of the appointing power and of the person appointed, must, *in some instances*, concur. The appointment is complete when the commission is signed by the President, but it is competent for Congress to require the performance of certain acts by the appointee, such as the execution of security, the taking of an oath of office, and the like, before he can enter into possession of the office. *This has been done* in relation to the office of Surveyor-General. The performance of the acts are conditions precedent to the holding of the office. (*United States* v. *Le Baron*, 19 How. 73.)

It is also competent for the Legislature to make the taking of the oath of office, etc., a condition subsequent, and to provide, as in the case before us, that the appointees should hold the office from the date of the appointment, subject to the condition that if they failed to qualify, or perform some other act, the appointment should go for naught.

By this reasoning the State loses nothing, since the term of office was twelve months, and if the term did not commence until one month after the appointment, the Commissioners are entitled to a salary for the month of July, 1877. They are entitled to be paid for twelve months—they have been paid but for eleven.

Let the writ issue as prayed for.

ROSS, J., and MCKEE, J., concurred.

[No. 7,060.—In Bank.]

THE BANK OF CALIFORNIA *v.* SHABER.

CLAIM AGAINST A CITY FOR INJURIES CAUSED BY MOBS OR RIOTS.—A claim for damages for injuries to property, caused by a mob or riot, (in the City and County of San Francisco) is not to be presented in the first instance to the Board of Supervisors for allowance, as in the case of other claims, but a judgment must first be had, and thereupon the board *must* order it to be paid, unless they shall determine to appeal.

ID.—ATTORNEY AND COUNSELLOR OF THE CITY AND COUNTY OF SAN FRANCISCO—APPEAL.—The Attorney and Counsellor of the City and County of San Francisco, while he holds his office by a tenure independent of the board, cannot act independently or against the directions of the board; and *held*, accordingly—where the board had determined by ordinance not to appeal from a judgment against the city and county for damages, caused by a mob or riot, and had ordered the payment of the same—that an appeal taken by the Attorney and Counsellor was without authority, and did not stay the enforcement of the order of the board.

ID.—ESTOPPEL.—*Held, further*, that the order of the board, directing the payment of the judgment, operated as an estoppel upon the city and county, as against an assignee for value, who purchased the claim, relying upon the action of the board.

ID.—MANDAMUS.—And *held, further*, that upon the refusal of the County Treasurer to pay the claim, *mandamus* was the proper remedy.

ID.—APPEAL—STAY OF PROCEEDINGS—MANDAMUS.—ROSS, J., (dissenting) was of the opinion, that the appeal by the City and County Attorney could not be treated as a nullity, and that, pending the appeal, the Treasurer could not, by mandamus, be compelled to pay the claim.

ID.—ID.—ID.—ID.—SHARPSTEIN, J., and MCKEE, J., (also dissenting) were of the opinion that *mandamus* could not be maintained: 1st, because the appeal, though improperly taken, operated as a stay; and 2ndly, because the petitioner had a plain, speedy, and adequate remedy, by a motion to dismiss the appeal.

APPLICATION for a writ of mandamus to Wm. R. Shaber, Treasurer, etc.

Wilson & Wilson, for the Plaintiff.

John L. Murphy, for the Defendant.

MYRICK, J.:

This is an application for a mandamus, to compel the respondent, as Treasurer, to pay a certain claim out of moneys in the treasury.

It appears from the petition, that on the 13th day of July, 1878, one J. C. Smith commenced an action against the City and County of San Francisco, in the District Court of the Fifteenth Judicial District, in and for said city and county, to recover damages for injuries to property in said city and county, caused by mobs and riots, which action was defended by said city and county; that such proceedings were had therein that said Smith recovered a judgment against said city and county for $65,273.76 damages, and $912.50 costs, which judgment was entered August 26th, 1879; that on the 1st day of September, 1879, said Smith presented to the Board of Supervisors of said city and county a certificate of the Presiding Judge of said Court, a certificate of the clerk of said Court, and a copy of the judgment roll in said action, together with a written demand, verified, for the payment of said judgment; that on the 30th of October, 1879, said Board of Supervisors, acting on the opinion and advice of the then Attorney and Counsellor for said city and county, and being satisfied that any further proceedings in said action, on the part of said city and county, would be unsuccessful, determined that said judgment should be paid, and thereupon an ordinance or authorization to that end was adopted by said board and approved by the Mayor; that the said claim was duly presented to the Auditor of said city and county, who duly indorsed the same "allowed," with date and proper fund;

that afterward, November 11th, 1879, the claim was presented to the then Treasurer of the said city and county for payment, but there being no moneys with which to pay the claim, the same was duly registered by said Treasurer; that after such registration, the said Smith duly assigned said claim to petitioner for value; that on the 15th of January, 1880, petitioner presented the claim to respondent, the present Treasurer, for payment, which payment was refused; and that at the last-named time, there was sufficient money in the treasury, properly applicable, with which to make the payment; that said Board of Supervisors never authorized any appeal from said judgment to be taken.

The respondent resists the application for the writ, upon two grounds, viz:

1. That neither the judgment, nor the claim based upon the judgment, is an existing or valid claim against said city and county.

2. That on the 15th of January, 1880, the said city and county duly appealed from the judgment of said District Court to this Court, which appeal is now pending in this Court, undecided.

First.—As to whether the claim referred to was, or is, a valid claim against said city and county.

Section 71 of the Consolidation Act authorizes the Board of Supervisors to levy taxes "for the payment of all demands upon the treasury thereof, authorized by law to be paid out of the same." Section 4452, Political Code, provides that "every municipal corporation is responsible for injuries to real or personal property situate within its corporate limits, done or caused by mobs or riots," and according to § 4453, Political Code, the action must be tried in the county where the occurrence took place. Section 4455, Political Code, provides that "on the certificate of the presiding officer, or of the clerk of the Court in which the judgment is rendered, the Board of Supervisors of the county, or the legislative authority of the city, must, by ordinance, direct and cause to be issued a warrant for the payment thereof on the general fund, and the same must be paid in its regular order, as other warrants of the municipal corporation are paid." According to the Act of April 23rd, 1858,

(Stat. 1858, p. 235) the Board of Supervisors of the City and County of San Francisco has power "to order paid any final judgment against said city and county." Section 84 of the Consolidation Act requires that every demand upon the treasury must, before it can be paid, be presented to the Auditor of the City and County of San Francisco to be allowed.

From these statutes, it will be perceived that a claim for damages caused by mobs or riots is not to be presented in the first instance to the Board of Supervisors for their rejection or allowance in whole or in part, as in the case of the general demands made against the city and county; but a judgment must first be had, which is an adjudication upon the merits and legality of the claim, and after the judgment is rendered, the Board of Supervisors have no claim to "allow"—that is, no claim which they can say that they will cause to be paid or not, as they may deem just—but the claim is one which they *must* order to be paid, unless they shall determine to test the correctness of the judgment on appeal to the Supreme Court; that their discretion extends only to the question whether or not they will appeal; that if they determine not to appeal, they must order, in usual course, the claim to be paid. After the order of payment is made by the Board of Supervisors, the claim must go to the Auditor for his scrutiny, and, when approved by him, it must be paid by the Treasurer in due course.

In this case, it appears that this claim went through each and all of the steps requisite before payment; which leads us to the consideration of the other objection made by the respondent, namely:

Second.—That there has been an appeal from the judgment of the District Court to this Court.

It appears from the papers on file that, at the time the Board of Supervisors was considering the question, whether it would order the payment of the judgment, the expediency of an appeal was considered, and a committee of the board conferred with the then Attorney and Counsellor of the city, and the result was, that instead of directing an appeal to be taken, the board ordered the judgment to be paid. It also appears that no order or authorization of the board, that an appeal be taken, has ever been given. The appeal was taken, (so far as it is an ap-

peal) by the Attorney and Counsellor of said city and county, upon his own responsibility, upon his own judgment, and in accordance with what he deemed to be his official duty, more than two months after the claim had been registered for payment—on the same day on which it was last presented for payment. Let us then see if he had authority so to do.

The Act of 1862 (Stat. 1862, p. 98) created the office of Attorney and Counsellor of said city and county, without defining his duties. An amendment to that act was passed, April 27th, 1863, (Stat. 1863, p. 771) defining his powers and duties, as follows: "Said Attorney and Counsellor shall perform such duties as Attorney and Counsellor in and for the said city and county, as the Board of Supervisors of said city and county shall from time to time prescribe."

Thus it will be seen that while he holds his office independent of a tenure derived from the board, he must receive from the board directions as to such duties as he may be called upon to perform. He cannot act independent of and against the directions of the board. The office of the Attorney and Counsellor of the city is continuous, even though different persons may be incumbents at different times; and if, in any given matter, general directions are given by the board to the Attorney and Counsellor, that he attend to and defend or prosecute a suit, it might be implied that he had authority to take such steps, and pursue such course as his judgment should direct, to a final conclusion; but if, at any time, the board should determine not to proceed further in the prosecution or defense of a suit or other matter, such determination by the board is binding upon the Attorney and Counsellor, and he must be governed thereby.

In this case, the determination of the board not to prosecute an appeal, and the making of the order for the payment of the claim, terminated the functions of the Attorney and Counsellor in regard to the suit and its conduct, and he was relieved of all further responsibility in the matter: he had no authority to review, reverse, or postpone the action of the board: its order was a determination not to appeal, and that the judgment should be paid, and an expression of opinion on its part that an appeal would be ineffectual; and the appeal thereafter taken by the Attorney and Counsellor, being without authority, cannot and

does not stay the enforcement of the order of the board. No act of fraud is alleged as to any party.

It may be added that the city by its proper officers having in effect determined not to appeal from the judgment, and having by resolution directed that the amount of the judgment be paid, (the board having the power so to do) and it appearing that the petitioner, relying upon this action of the board, bought the claim for value, we think respondent is estopped from now contesting the validity of the judgment.

In support of the views herein expressed, reference may be had to the following authorities: *People* v. *Fitzgerald, Treasurer*, 54 How. Pr. 1; *Board of Supervisors* v. *Bowen*, 4 Lans. 31; *People* v. *Lawrence*, 6 Hill, 244; *El Dorado County* v. *Elstner*, 18 Cal. 144; *Supervisors* v. *Briggs*, 3 Denio, 173; *Martin* v. *Supervisors*, 29 N. Y. 645.

In *Board of Supervisors* v. *Bowen*, 4 Lans. 31, the Court says: "The powers of a county, as a body politic, can be exercised only by the Board of Supervisors. When this board is sued, the county is sued. The corporation having the power to sue and be sued, has power to terminate the litigation. It would be a most extraordinary doctrine to hold, that, because a county had become involved in a litigation, it must necessarily go through with it to the bitter end, and had no power to terminate it.

In *The People* v. *Fitzgerald*, 54 How. Pr. 1, where bills had been passed upon and audited by the Board of Supervisors, and the certificates thereof duly assigned to the relator, *held*, that on refusal of the County Treasurer to pay the same, mandamus was the proper remedy. The action of the board was conclusive, and the Treasurer is estopped from questioning its correctness. Let the writ issue.

MORRISON, C. J., and THORNTON, J., concurred.
MCKINSTRY, J., concurred in the judgment.

ROSS, J., dissenting:

I dissent. I think the writ should be denied, for the reason that we cannot, in this proceeding, treat the appeal taken by the City and County Attorney as a nullity. In my opinion, how-

ever, when the Board of Supervisors directed the judgment that had been recovered by Smith against the City and County of San Francisco to be paid, it was, in effect, an ending of the controversy, and a determination by that body not to take an appeal from the judgment. And I think it cannot be doubted that the Board of Supervisors had the power to stop the litigation by directing payment of the judgment, rather than put the city and county to further cost in the prosecution of an appeal, which, as shown by the record in this proceeding, they considered, after consultation with the late City and County Attorney, who was the attorney who tried the cause, would be a fruitless appeal. (*Board of Supervisors of Orleans County* v. *Bowen*, 4 Lans. 30, 31.) The record here shows that after this action on the part of the Board of Supervisors, after the resolution directing payment had been approved by the Mayor, and after the claim had been presented to the Auditor and indorsed "allowed," and after it had been presented to the Treasurer for payment, and by the latter official duly registered, but not paid for want of funds, the petitioner, the Bank of California, in good faith, and for value, purchased the demand. Subsequent to all this, the present City and County Attorney, of his own motion, and in pursuance of what he deemed his duty, took an appeal to this Court from the judgment. The appeal was not directed or authorized by the Board of Supervisors, and the action of the City and County Attorney in that regard was in conflict with the previous action of the board respecting the matter. Nevertheless an appeal was taken by the law officer of the city and county, and is still pending, and as long as it exists, I do not see how the Treasurer can be compelled by mandamus to pay the claim. I think it proper, however, to say that the appeal should in my judgment, be dismissed on motion; for I think, that in view of the facts appearing, the city and county would be estopped from further questioning the legality of the demand, even had the Board of Supervisors authorized the appeal, which, as we have seen, it did not do. (*People* v. *Fitzgerald, Treas.*, 54 How. Pr. 1; *Martin* v. *Supervisors*, 29 N. Y. 645; *El Dorado Co.* v. *Elstner*, 18 Cal. 144; *Board of Supervisors* v. *Bowen*, 4 Lans. 31.)

SHARPSTEIN, J.:

I dissent. In my opinion, this application cannot be granted consistently with the law relating to mandamus.

1. If the act is not one which the law specially enjoins the performance of by the Treasurer, as a duty resulting from his office, the writ ought not to issue. (Code Civ. Proc. § 1085.)

It is conceded that an appeal is pending in this Court from the judgment which the Board of Supervisors ordered to be paid, and which the Treasurer refuses to pay because of the pendency of such appeal. One effect of an appeal is to stay all further proceedings upon the judgment appealed from until the determination of the appeal. If we accord to this appeal that effect, it operated *ipso facto* as a stay from the time it was perfected. That such was, and is, the effect of it, seems too plain for argument. But it is contended, however, that the appeal was improperly taken, because the Board of Supervisors did not direct it to be taken, but, on the contrary, ordered the judgment to be paid before the appeal was taken. Was that a proper matter for the Treasurer to determine? If, instead of an appeal being taken, an injunction which forbade his paying the judgment had been served upon him, no one would claim that he might disregard that on the ground that the case was not one in which an injunction could properly issue. Nor would a court compel him by mandamus to pay the judgment, after being so enjoined, although it was apparent that the injunction was improperly granted. If the Treasurer himself was not authorized to determine the validity of the appeal, the Court, in this proceeding, will not determine it. What he was not fully authorized and bound to do without the command of this Court, this Court will not command him by mandamus to do. If there be any doubt as to the duty of an officer to act in a given case, courts will not by mandamus compel him to act. Before we can grant the application in this case, we must determine that the appeal was improperly taken, and that, too, in a proceeding to which the officer taking the appeal is not a party. It does not seem to me that an appeal to this Court can be virtually dismissed in a case where its validity is only collaterally involved. I think it can only be done in a direct proceeding, in

stituted for that purpose. To grant the writ prayed in this case, is to decide that the Treasurer was bound to determine whether the law officer of the city, whose chief duty it is to act as the legal adviser of the other officers, transcended his authority in taking an appeal to this Court. If it was not the duty of the Treasurer to determine that question, then there is no ground for the issuance of a writ of mandamus to him, in this case.

2. It does not appear in this case that the plaintiff has not a plain, speedy, and adequate remedy in the ordinary course of law. (Code Civ. Proc. 1086.) If the appeal pending in this Court is here under circumstances which will justify this Court in disregarding it to the extent demanded by the plaintiff, then this Court would, upon a single motion, dismiss it. Can any remedy more plain, speedy, and adequate than that be devised? And that, too, would be in the ordinary course of law. It cannot reasonably be supposed that this Court would hesitate to dismiss an appeal taken without authority. If the City and County Attorney had no authority to take this appeal, the Court, upon being satisfied that he had not, would promptly dismiss it. And the want of authority to take the appeal is the only ground upon which it is even suggested that the Court can grant this application. Then why not attack the validity of the appeal directly instead of collaterally? Why proceed against an officer who had no hand in that matter, instead of against the one who is wholly responsible for the appeal?

To accomplish, indirectly, by mandamus, what can be accomplished directly by a simple motion is, as I view it, to reject a plain remedy and resort to a doubtful one. This the statute does not sanction. "The existence or non-existence of an adequate and specific remedy at law in the ordinary forms of procedure is, therefore, one of the first questions to be determined in all applications for the writ of *mandamus*, and whenever it is found that such remedy exists, and that it is open to the party aggrieved, the courts uniformly refuse to interfere, by the exercise of their extraordinary jurisdiction." (High's Extraordinary Remedies, 17.)

I am not satisfied that it was the duty of the Treasurer to disregard the stay which the appeal from the judgment created, and I am perfectly satisfied that the plaintiff, upon its own

theory, has a plain, speedy and adequate remedy, by a motion to dismiss the appeal, which constitutes the only obstacle to the payment of the judgment. Therefore, I think that the application for the writ of mandamus in this case should be denied.

McKEE, J., concurred in the dissenting opinion of Mr. Justice SHARPSTEIN.

[No. 7,090.—In Bank.]

THE PEOPLE EX REL. BECKWITH *v.* THE BOARD OF EDUCATION OF OAKLAND ET AL.

TEXT BOOKS—COMMON SCHOOLS—CONSTITUTIONAL LAW—REPEAL OF STATUTE. Section 7, art. ix, of the Constitution, providing that "the local Boards of Education, and the Boards of Supervisors and County Superintendents of the several counties which may not have County Boards of Education, shall adopt a series of text-books for the use of the common schools within their respective jurisdictions," is self-executing, and operated as a repeal of the Act of December 13th, 1875, which provided that the text-books in use in the years 1873-4-5 should be continued in use until otherwise provided by statute.

ID.—LOCAL BOARDS OF EDUCATION—DEFINITION.—Each Board of Education, whether of a city and township, or county, is local as to the territory of its jurisdiction, and where portions of a county are subject to local boards, the County Board is local as to the balance of the county.

ID.—COMMON SCHOOLS—CONSTITUTIONAL LAW—COUNTY SUPERINTENDENT—BOARDS OF SUPERVISORS.—A question stated as to how the powers of the County Superintendents and Boards of Supervisors are to be executed, in cases where the selection of the text-books devolves upon them; and *held*, that as to such cases, the section may not be self-executing, and we might thus have a section self-executing as to one class of officers, and not so as to another.

APPLICATION for a writ of mandamus.

The facts are stated in the opinion.

A. L. Hart, and *A. A. Cohen*, for Appellant.

Section 7, art. ix, of the new Constitution is not self-executing. The entire article needs legislation before it can go into effect. (*Myers* v. *English*, 9 Cal. 341; *People* v. *Lake Co.* 33 id. 487; *Ex parte Wall*, 48 id. 318; *Williams* v. *Mayor of Detroit*, 2 Mich. 563; *French* v. *Teschemaker*, 24 Cal. 518; Const.

of Va. § 3, art. iii; *Cahoon v. The Commonwealth*, 20 Grat. 733; *Supervisors of Doddridge* v. *Stout*, 9 W. Va. 705; Const. of Penn. § 1, art. xi; *Lehigh Iron Co.* v. *Lower Macungie*, 81 Penn. St. 482; *State of Missouri* v. *Macon Co. Court*, 41 Mo. 453; *Allyber* v. *The State*, 10 Ohio St. 589; *State* v. *Barbee*, 3 Ind. 258; *State of Kansas* v. *Thompson*, 2 Kans. 432.) Article ix is intended to furnish a new system to be operative in the future, and to apply to all public schools in the State; and the local board, which is to administer this article, is a board which shall constitute a part of the school system which the Legislature is empowered to provide. We cannot now tell what the local educational authority of the city of Oakland will be, when the Legislature has done its part. If the action of the present board is sustained, then the new board, which the Legislature is authorized to create, cannot act for four years; and the Legislature is thus deprived of the power conferred upon it to adopt—after informing itself as to the requirements of the educational interests of the State—a full and complete system.

Geo. L. Morgan, for Respondent.

The board acted within its authority, because § 7 of art. ix, of the new Constitution, is self-executing.

The rule: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right give nmay be enjoyed and protected, or the duty imposed may be enforced." (Cooley's Const. Lim. 4th ed. p. 101; *State* v. *Holliday*, 64 Mo. 526; *St. Joseph Schools* v. *Patterson*, 62 id. 444; *State* v. *Weston*, 4 Neb. 216; *Beecher* v. *Baldy*, 7 Mich. 498; *Thomas* v. *Owens*, 4 Md. 189; *Hills* v. *Chicago*, 60 Ill. 91; *People* v. *McRoberts*, 62 id. 42; *Hyatt* v. *Allen*, 54 Cal. 353; *People* v. *Rumsey*, 64 Ill. 44; *Chance* v. *Marion Co.* id. 66; *O'Connor* v. *Leddy*, id. 299.)

"So far as any distinct provision is made which by itself is capable of enforcement, it is law." (Cooley's Const. Lim. p. 101.) Examples—affirmative provision: *People* v. *Rumsey*, 64 Ill. 44; *Chance* v. *Marion Co.* id. 66; *O'Connor* v. *Leddy*, id. 299; *State ex rel. Roberts* v. *Weston*, 4 Neb. 216; *Thomas* v. *Owen*, 4 Md. 190; *People* v. *McRoberts*, 62 Ill. 38; *Hyatt* v. *Allen*, 54 Cal. 353.

Myrick, J.:

This is an application for a writ of mandate directing the respondents to use and cause to be used in the public schools of the city of Oakland the text-books known as the McGuffey series of Readers.

The facts upon which the application is based are as follows: During the years 1873, 1874, and 1875, and thence continuously until January 17th, 1880, the McGuffey series of Readers were by law in general use in the public schools of said city. At a meeting of the Board of Education of said city, held January 17th, 1880, the said board determined and resolved to adopt and introduce into general use as text-books in all the public schools of said city, the text-books known as the Appleton series of Readers, in lieu and in place of the McGuffey series of Readers; which said resolution has been enforced, and ever since said day, said Appleton series of Readers has been continuously and is used in said city, in lieu and in place, and to the exclusion, of said McGuffey's series of Readers.

The law under which the application for the writ is made is as follows:

By the Acts of March 14th, 1868, (Stat. 1867–8, p. 161) and March 1st, 1872, (Stat. 1871–2, p. 174) it was provided that the Board of Education of the city of Oakland shall have sole power to determine what text-books shall be used in the schools of that city. By an amendment to § 1521, Political Code, in effect from March 13th, 1874, the State Board of Education was given the power to "prescribe and enforce the use of a uniform series of text-books in the public schools, except in the City and County of San Francisco." By the Act of December 13th, 1875, (Stat. 1875–6, p. 1) it was provided that "the text-books in use in the public schools during the years 1873–4–5, shall be continued in use in all the public schools of this State, until otherwise provided by statute."

The respondents rely upon § 7, art. ix, of the new Constitution, claiming that it is self-executing, and that local boards have the right under it to adopt a series of text-books to be used within their respective jurisdictions. The section is as follows: "The local Boards of Education, and the Boards of Supervisors, and

County Superintendents of the several counties which may not have County Boards of Education, shall adopt a series of text-books for the use of the common schools within their respective jurisdictions. The text-books so adopted shall continue in use for not less than four years. They shall also have control of the examination of teachers, and the granting of teachers' certificates, within their several jurisdictions."

Several portions of article ix are not self-executing; for instance, § 5: "The Legislature *shall provide* for a system of common schools, by which a free school shall be kept up and supported in each district, at least six months in every year"; and at least part of § 6, which provides that the public-school system shall include such schools as *may be* established by the Legislature, etc. Here, action by the Legislature may be necessary to give force and effect to the provisions. But it requires no legislation to give force to the last clause of § 6, namely, that "the entire revenue derived from the State school fund and the State school tax shall be applied exclusively to the support of primary and grammar schools." Section 8 requires no legislation to enforce it, namely, that "no public money shall ever be appropriated for the support of any sectarian or denominational school," and that no sectarian or denominational doctrine shall be taught in any of the common schools of the State. Neither does § 9 require legislation, that "the University of California shall constitute a public trust": and that "no person shall be debarred admission to any of the collegiate departments of the University on account of sex."

Thus it will be seen that there are parts of article ix which are self-executing, and that the system of common schools, for which the Legislature is to provide, does not embrace all matters referred to in the entire article. Let us see whether the section in question (§ 7) is self-executing. "The local Boards of Education * * * shall adopt a series of text-books," etc. There are local Boards of Education existing in this State, and their existence is here recognized, and reference is here made to them, as well as to such as may hereafter be created by the Legislature.

Section 1 of the Schedule provides, "that all laws in force at the adoption of this Constitution, *not inconsistent therewith*,

shall remain in full force and effect," etc. The Act of December 13th, 1875, provided that the text-books in use in 1873–4–5 shall be continued in use until otherwise provided by statute. The new Constitution, which is, of course, above the statute, says that the *local boards* shall adopt a series of text-books. Here, then, clearly seems to be a power given. It does not say, "in such manner as the Legislature *may* prescribe," but the local board "*shall adopt.*" And the power thus given is inconsistent with the former statute; or, rather, that statute is inconsistent with the power given, and must yield precedence. It might very well be asked: What action of the Legislature is necessary to set this section in operation? Possibly the Legislature may prescribe rules by which boards shall be governed in selecting books, viz., to give notice, or to have the matter considered at some meeting called for the purpose, or other rule of machinery merely; but such legislation could not be used to take away the right of ultimate selection. Nor could the Legislature, by non-action, (even if so disposed) postpone or defeat the right or power of the boards to select. If it cannot postpone for ten years, how can it for thirty days? Evidently, in view of the legislation theretofore had, the people, in adopting the new Constitution with the provision in question in it, intended to localize the selection of text-books, and authorize the selection to be made according as the tastes, or wishes, or judgment of officers in different counties should determine to be for the best interests of education. The people of Sacramento County may prefer one set of books; of Siskiyou, another; of Los Angeles, another; of San Francisco, yet another. The evident object of the Constitution was to allow the exercise of such preference. The provisions of the new Constitution being mandatory, we do not see how the words "shall adopt" can be held to attend upon future legislation.

Some doubt has been suggested as to the meaning of the phrase "the local Boards of Education"; that is, does the phrase mean County Boards only, or does it include a board having jurisdiction over a portion of a county, as of a city or township? It was suggested that in Alameda County, for instance, there might be a general board for the county, a board for the city of Oakland, and a board for some particular town-

ship; in such case, which board would have authority to select text-books, and for what territory? We are of opinion that the phrase "local board" would apply to the territory over which it exercises jurisdiction as a board. The section says, "within their respective jurisdictions." Each board, whether of a city, township, or county, is local as to the territory of its jurisdiction. The board in a city is local as to the city; the board of a township is local as to the township, and the board of a county is local as to the county; and where portions of a county are subject to local boards for such portions, the County Board is local as to the balance of the county.

Another point is suggested in reference to which some difficulty arises, and, although that point is not necessarily involved in the decision of the case before us, we will refer to it. In counties or parts of counties not within the jurisdiction of a local Board of Education, the County Superintendent and the Board of Supervisors are to adopt the text-books. The Supervisors have machinery for their meetings, and the Superintendents have machinery for their transactions; but where they are to act in concert, what machinery is to direct such action? Who is to record its proceedings? How is the voting to be had, whether by the Supervisors as a unit, or each to have a vote? If as a unit, and they differ from the Superintendent, who is to decide? Very likely, as to such cases, the section may not be self-executing. If so, we might have, arising from incompleteness, a section self-executing as to one class of officers, and not self-executing as to another. As to Boards of Education, the objections above noted do not apply: because they already have machinery for meeting, voting, and recording proceedings.

It has been urged that it could not have been intended that a Board of Education could, without notice, at any meeting, transact such important business as that of selecting a series of text-books for the public schools, the books thus selected to be used four years without change, no matter what change might occur in the wishes of the board or the people, and no matter what change might occur in the prices to be demanded for the books. We can only say that all those matters were doubtless in the minds of the people in adopting the Constitution, and that

we must take the instrument as it is, giving to it such construction as its language will fairly and reasonably import, leaving its correction, if it should be found to need any, with that power which alone has authority to change or modify it.

It was conceded on the argument that the relator was a proper person to make the application, and that the writ of mandate is the proper remedy; therefore we express no opinion in relation to these points.

We deem it proper to say, that at the time the facts of this case arose, there had been no action by the Legislature in regard to the subject, under the new Constitution; and the fact of such non-action is deemed by us a material ingredient in reaching the conclusions above indicated. If the power to select books depended upon legislative action, non-action as to the mode might have defeated the exercise of the power.

The alternative writ heretofore issued is dissolved, and the application for a peremptory writ is denied.

SHARPSTEIN, J., MCKINSTRY, J., and THORNTON, J., concurred.

MCKEE, J., concurred in the judgment.

[No. 6,466.—Department No. 2.]

HEMME v. HAYS.

PRACTICE—JUDGMENT ON THE PLEADINGS—FRIVOLOUS ANSWER—DEFINITION.—A frivolous answer is one which denies no material averment in the complaint, and sets up no defense; and when such an answer is filed, the plaintiff may apply for judgment on the pleadings.

ID.—APPEAL—JUDGMENT ROLL—BILL OF EXCEPTIONS.—Upon an appeal from the judgment, where there is no bill of exceptions, the ruling of the Court below on a motion for judgment on the pleadings cannot be reviewed on appeal.

APPEAL from a judgment for the plaintiff, in the Twenty-first District Court, County of Modoc. CLOUGH, J.

The judgment recites: "Counsel for plaintiff filed a written motion for judgment on the pleadings, which motion is made

on the ground that the facts stated in the answer do not constitute any legal defense to the action. The Court being fully advised, orders that the said motion of plaintiff be sustained, and thereupon it is ordered and adjudged," etc.

The other facts are stated in the opinion.

J. C. Bowmer, and *G. F. Harris*, for Appellant.

R. R. Provines, for Respondent.

SHARPSTEIN, J.:

This is an action upon a promissory note, made and delivered by the defendant to the plaintiff. The defendant in his answer denies the due execution of the note, or that it was executed for a valuable consideration for reasons thereinafter set forth. And he alleges that on and after the year 1870, and up to about the 1st of November, 1875, he was engaged in the business of buying and selling goods, at the town of Yuba City, in this State, and that during the last two years of that period he had in his employ, as clerk and business manager, one William Hemme, who, during said time, was also the agent of the plaintiff, and that he acted in all business transactions between the plaintiff and defendant, and that said William Hemme was so acting at the date of the execution of said note, and that said William Hemme, by fraudulently representing to the defendant that there was a balance due to plaintiff from defendant, upon an account between them, induced the defendant to sign said note, and that defendant signed said note under protest and without any consideration whatever. Defendant further alleges that said plaintiff, while acting as defendant's agent, received various sums of money from defendant to disburse for him, which said plaintiff failed to use as he was directed by defendant to do, said sums in the aggregate amounting to about $7,702.77.

Defendant also alleges that there has never been any final settlement of account between him and plaintiff, and "that at the date of the execution of said notes, the books of account existing between plaintiff and defendant, as kept by said plaintiff, show a balance in favor of said defendant and against plaintiff

of one hundred and nineteen and thirty one-hundredths dollars, which amount, taken together with the sum of seven thousand seven hundred and two dollars and seventy-seven cents, moneys not accounted for, as above set forth, make a balance in favor of this defendant and against said plaintiff of seven thousand eight hundred and twenty-two and eight one-hundredths dollars," for which amount he demanded judgment against the plaintiff.

The plaintiff moved for judgment for the sum prayed for in his complaint, which motion was granted, and judgment was entered accordingly. From that judgment the defendant has appealed.

The defendant denies the due execution of the note, and that it was executed for a valuable consideration, for certain reasons which he sets forth in his answer. Those reasons do not show that the note was not duly executed, and for a valuable consideration. Hence there is no denial of the due execution of the note, or that it was executed for a valuable consideration. The attempt to set up a counter-claim, if in fact any such attempt is made, cannot be regarded as even a partial success.

A frivolous answer is defined to be one which denies no material averment in the complaint, and sets up no defense. (*Nicholas* v. *Jones*, 6 How. Pr. 355; *Hull* v. *Smith*, 8 id. 149; S. C. 1 Duer, 649; *Brown* v. *Jenison*, 3 Sand. 732; *Livingston* v. *Hammer*, 7 Bosw. 674.)

Where an "answer presents nothing, either by way of denial or new matter, to bar or defeat an action," the plaintiff may apply for judgment upon the pleadings. (*Felch* v. *Beaudry*, 40 Cal. 439; *Corwin* v. *Patch*, 4 id. 204; *Gay* v. *Winter*, 34 id. 153; *Fitzgibbon* v. *Calvert*, 39 id. 261.)

Judgment affirmed.

MYRICK, J., concurred.

THORNTON, J., concurring in the judgment:

I concur in the judgment, for the reason that the appeal is taken from the judgment, and there is no bill of exceptions bringing before us the ruling of the Court below on the motion for judgment on the pleadings. This motion and the ruling there-

on is not made a part of the judgment roll by a bill of exceptions. Without such a bill it constitutes no part of the judgment roll, and, in my opinion, the ruling on the motion cannot be considered on this appeal, which is stated in the notice of appeal to be taken from the judgment roll.

[No. 7,043.—Department No. 1.]

HARLAN ET AL. v. ELY.

PRINCIPAL AND SURETY — DEFINITION — PROMISSORY NOTE.—One may be a surety only as between himself and his co-promisor, and yet, as to the creditor, both his apparent and actual character be that of principal. *So held*, in an action upon a promissory note, where it appeared that one S. applied to the plaintiffs for a loan, and that they agreed to let him have the money if he would give a note signed by himself and the defendants, as joint and several makers; and the note was so executed; but all the parties knew that the loan was made for the sole benefit of S., and that, as between himself and the defendant, the latter was merely a surety.

INSUFFICIENT FINDING.—The Court, after finding other facts, found that "the foregoing are all the facts of the case, and all and singular the allegations of the * * answer are untrue, *except only in so far as the same accord with the foregoing facts.*" *Held*, insufficient.

APPEAL from a judgment for the plaintiffs, and from an order denying a new trial, in the Sixth District Court, County of Yolo. DENSON, J.

The facts are stated in the opinion.

J. C. Ball, and *J. W. Armstrong*, for Appellants.

Upon the facts found, the defendant was only surety. (Civ. Code, §§ 2831, 2832, 2844.) Whatever the law may have been prior to the Codes, it is clear that parole evidence is admissible, under the Civil Code, that a joint maker is in fact a surety. (*Perley* v. *Loney*, 17 Up. Can. Q. B. Rep. 279; *Hubbard* v. *Gurney*, 64 N. Y. 457; *Holland* v. *Johnson*, 51 Ind. 346; *Springer* v. *Toothaker*, 43 Me. 383; *Pooley* v. *Harradine*, 7 El. & B. 431; *Greenough* v. *McClelland*, 2 El. & E. 424; Brandt on Suretyship, §§ 17, 18, 19, 20; 2 Whart. Ev. § 952; *Lawton* v. *Gordon*, 34 Cal. 36.)

The plaintiffs received under their mortgage more wheat than

would pay the note, and parted with it without the knowledge of the defendant. They had no authority to sell the wheat on credit, or to take the check of Mansfield in payment.

The finding of the Court was insufficient. (*Johnson* v. *Squires*, 53 Cal. 37; *Elliott* v. *Peck*, id. 84; *Phipps* v. *Harlan*, id. 87; *Baggs* v. *Smith*, id. 88; *People* v. *Forbes*, 51 id. 628; *Ladd* v. *Tully*, id. 277; *Breeze* v. *Doyle*, 19 id. 102.)

J. H. McKune, for Respondent.

The note sued upon is signed by defendant as principal, and, as to the plaintiffs, he (having bound himself as principal) must be held to his contract. (*Dane* v. *Corduan*, 24 Cal. 165; *Shriver* v. *Lovejoy*, 32 id. 574; *Damon* v. *Pardow*, 34 id. 280; *Aud* v. *Magruder*, 10 id. 288; Code Civ. Proc. § 1856; 5 Cal. 173; 9 id. 557; id. 21.) Sections 1831–2 of the Civil Code do not change the rule established in the cases cited.

McKINSTRY, J.:

The District Court amongst other things found: "On the 31st day of October, A. D. 1877, one D. F. Scroggins applied to plaintiffs for a loan of $3,000, and offered as security therefor his own note and a mortgage upon his crop to be grown the ensuing season, which was declined by plaintiffs; but it was finally agreed between Scroggins and plaintiffs that if he would give a note, signed by himself and the defendant, as joint and several makers, and also give the mortgage suggested, they would let him have the money.

Thereupon the note sued upon, (a copy of which is set out in the second amended answer herein) was drawn up, and Scroggins went with it to the defendant's house, informed him of the arrangement with plaintiffs, and procured him, the defendant, to join him (Scroggins) in the execution of the note.

Said note was executed by said Scroggins and the defendant on that day, and on the first day of November, A. D. 1877, Scroggins took said note to the plaintiffs and delivered it to them, and at the same time executed and delivered to them the mortgage of that date, (a copy of which is set out in the second amended answer herein) and received from them the sum of $3,000 in United States gold coin.

The defendant never received any part of said money, and all of the aforesaid parties knew and understood that the loan was made and intended for the sole benefit of Scroggins, and that as between the defendant and Scroggins the defendant was merely a surety.

On the 15th day of June, A. D. 1878, the said Scroggins made, executed, and delivered to the plaintiffs another mortgage, a copy of which is also set out in the second amended answer; which second mortgage was executed to cure some defects, or supposed defects in the first, and also to secure the payment of another note herein set out."

Section 2832 of the Civil Code is: "One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is, in fact, a surety, except as against persons who have acted on the faith of his apparent character as principal."

The section of the Civil Code relates to a class of cases in which the apparent differs from the real character of a contracting party. But one may be a surety merely, as between himself and his co-promisor, and yet, as to the creditor, both his apparent and actual character be that of principal. It is suggested, with much plausibility, that the plaintiffs could not have acted on the faith of the defendant's apparent, because they know his real, character. But this is a claim that a knowledge of plaintiff's that, as between themselves, defendant was merely the surety of Scroggins, (that it was their agreement that Scroggins should pay the note) conclusively establishes an agreement on the part of plaintiffs, that defendant should be surety only as to *them*. If adopted as a rule, this would be to declare in effect that a man cannot promise in writing to be bound as principal, if, in fact, as to another party to the same or another instrument, he is merely the surety. However positive the declaration that the purpose was to create a primary and unconditional liability, the instrument could not be made operative in the manner intended by all the parties interested in it. Such cannot be the law.

It would be strange if one could not waive his right to be treated as surety, and agree that he should be bound as upon his unconditional promise.

The section of the Code is to be construed with reference to the law as it stood when the Codes were adopted. Assuming this, it by no means follows that the payee, under circumstances like those disclosed in the record, may not rely upon the written contract. In *Shriver* v. *Lovejoy*, 32 Cal. 575, it was held that all the joint and several makers of a promissory note, as between themselves and the payee, are regarded as principals; that neither of the makers could show in defense that, as between himself and the other joint makers, he was only a surety, and that when the payee sued all, attached property of the other makers sufficient to satisfy his claim, and then released it, the surety was not discharged. Such is, then, the law of this State, unless the section of the Civil Code above cited has changed the rule. In the present case, the circumstances do not show that the actual relation of defendant to *plaintiffs* was different from the apparent relation. We cannot say, at all events, that the evidence so completely established the contrary as that a new trial should be granted. As between defendant and Scroggins, the former may have been surety for the latter, and yet both be bound as principals by their contract with plaintiffs. Such was the effect of their written promise, and the other facts found might coexist with the conclusion to be drawn from the written promise. Plaintiffs refused to loan the money to Scroggins alone, but agreed to lend it and did lend it to Scroggins and defendant upon their joint and several obligation. That they knew that the former alone was to get the use of the money, cannot change the result. It was lent to both. The character which it was agreed should be performed by defendant in the transaction with plaintiffs was that of principal. If plaintiffs had advanced their money without notice of the suretyship, they could have held defendant as maker. If they had agreed to take him as surety, they could only have held him as such, although he appeared as principal upon the written instrument. The present is a case beyond the statute, in which the Court below reached the conclusion that the defendant had not appeared in duplicate character in his transaction with the plaintiffs, but that his real and apparent relation to them was the same. We cannot say the Court erred in coming to this conclusion.

It may be that defendant, although a principal debtor, is en-

titled to have applied upon the promissory note, or to claim by way of set-off, the value of the grain received by plaintiffs under the mortgage agreement, and by them disposed of for the check of an insolvent. It is not necessary, however, to determine any question thus suggested, inasmuch as we are convinced the judgment must be reversed, because of the insufficiency of the *findings*. Defendant was entitled to a distinct finding by the District Court upon every material issue, whether the issue was made by denials of averments in the complaint or by the denials presumed by law of averments in the answer. The fifth finding of the Court below was as follows: "The foregoing are all the facts of the case, and all and singular the allegations of the second amended answer are untrue, *except only in so far as the same accord with the foregoing facts.*"

The Court below should have assumed the labor of comparing the allegations of the answer with the facts by it found; as it is, we are not informed which of the allegations of the answer were in the opinion of the Court below true, which untrue. We cannot assume the function of determining for the first time the truth or falsity of any of them, either by reference to the testimony or to the facts actually found. A finding that all the "material" averments of a pleading are true or untrue is insufficient. (*Ladd* v. *Durkin*, 51 Cal. 277. See *Johnson* v. *Squires*, 53 id. 37.) But the fifth finding is no more certain than a finding which refers only to *material* allegations.

Judgment and order reversed, and cause remanded for a new trial.

ROSS, J., and MCKEE, J., concurred.

[No. 6,966.—Department No. 2.]

KOUTZ *v.* VANCLIEF.

PROMISSORY NOTE—RENEWAL—CONSTRUCTION OF CONTRACT.—The maker of a promissory note, dated November 3rd, 1872, indorsed thereon the following promise: "I hereby renew the within note, and promise to pay the same within two years from this date—the object being to prevent a bar within the next two years. P. Vanclief, October 18th, 1876." In an action brought upon the note, June 2nd, 1879, *held*, that the effect of the renewal was to extend the time of payment two years from its date, and that the action was therefore prematurely brought.

ID.—ASSIGNMENT—ADMINISTRATOR—NON-JOINDER OF PARTIES.—In the same action—the payee being deceased—it appeared that the plaintiff and his sister E. G. (of whom he held a power of attorney) were the sole heirs and distributees of the payee's estate, and that the administrator had assigned the note to the plaintiff. *Held*, that the plaintiff failed to prove that he was the sole owner of the note, and that E. G. should have been joined.

ID.—EVIDENCE—RECORD—JUDGMENT—DECREE OF PROBATE COURT—JURISDICTION.—*Held*, also, that the decree of distribution and the letters of administration were admissible in evidence, unaccompanied by the other parts of the record.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Tenth District Court, County of Colusa. KEYSER, J.

On the trial the plaintiff introduced in evidence the letters of administration, and the decree of distribution, in the matter of the estate of John Koutz, by the latter of which all the estate of the deceased was distributed to the plaintiff and Elizabeth Gelwicks, (brother and sister of deceased) as his sole heirs. The defendant's counsel objected to the former order, on the ground that there was no evidence of any petition for letters of administration; and to the latter, on the ground that it did not appear that the Probate Court had any jurisdiction to make said decree, there being no evidence of the facts conferring jurisdiction in such case. The other facts are stated in the opinion.

Wm. M. Stewart, and *Wm. F. Herrin*, for Appellant.

The original note being barred, the plaintiff can only recover upon the new promise, and in accordance with the terms. The action was therefore prematurely brought. (*Creighton* v. *Rosseau*, 1 Iowa, 133; *Reynolds* v. *Green*, 27 Ohio St. 417; Angell on Limitations, §§ 235–237; *Chabot* v. *Tucker*, 39 Cal. 438;

Code Civ. Proc. § 360; *McCormick* v. *Brown*, 36 Cal. 180; *Farrell* v. *Palmer*, 36 id. 188; *Waters* v. *Earl of Thanet*, 2 Gale & D. 166.) Elizabeth Gelwicks was equally interested with plaintiff, and should have been made a party.

The Court erred in admitting in evidence the letters of administration, and the decree of the Probate Court, without showing the jurisdiction of that Court. (*Harper* v. *Rowe*, 53 Cal. 283; 39 id. 653; 40 id. 249; 18 Abb. Pr. 349.)

John T. Harrington, and *Wm. G. Dyas*, for Respondent.

The administrator, by virtue of the decree of distribution, had the power to assign the note to the plaintiff, who held the power of attorney and was agent of his co-heir. Independently of this, the right of the administrator to assign choses in action exists at common law, and has not been affected by statute. (*Low* v. *Burrows*, 12 Cal. 181.)

The Probate Court being a court of record, it is presumed that all necessary preliminary steps were taken before the issue of letters, and the decree of distribution. (*Irwin* v. *Scriber*, 18 Cal. 500; 1 Greenl. Ev. § 550; *Barrett* v. *Carney*, 33 Cal. 541; *Foote* v. *Richmond*, 42 id. 440; *McCauley* v. *Fulton*, 44 id. 356; Code Civ. Proc. § 98.) It was not the intention of the indorsement that an extension of two years should thereby be given to the maker of the note, but only that the note should be kept alive for that period.

SHARPSTEIN, J.:

The first allegation of the complaint is, that on the 3rd day of November, 1872, the defendant made his promissory note in writing to John Koutz, and promised to pay him or order, six months after that date, $500, with interest at the rate of one per cent per month. The second is, that on the 18th day of October, 1876, defendant, in writing, admitted said indebtedness, and agreed to pay the same. The third is, that on the 1st day of February, 1873, the said John Koutz, at the request of defendant, laid out for his use the sum of $43.02, which he, on the 18th day of October, 1876, promised in writing to pay said John Koutz. These are followed by allegations of the death of

John Koutz, intestate, on the 25th of November, 1876, the issuance of letters of administration to one John Ross, administration upon the estate of deceased, final settlement and distribution thereof, and that the plaintiff was entitled to receive the property of said estate, and did receive from said administrator said note and demand sued upon in this action. It is also alleged that on the 4th day of May, 1877, the defendant, in a writing, signed by him and addressed to the plaintiff, acknowledged said indebtedness, and that no part of said note or demand has been paid. The complaint is not verified, and the defendant denied all the allegations of it. On the trial the plaintiff introduced in evidence a note with indorsements on it, of which the following are copies:

"$500. NOVEMBER 3rd, 1872.

"Six months after date, without grace, I promise to pay to John Koutz, or order, the sum of five hundred dollars, payable in gold coin of the Government of the United States, for value received; with interest thereon at the rate of one per cent. per month from this date until paid. P. VANCLIEF."

Indorsed as follows:

"I hereby renew the within note, and promise to pay the same within two years from this date. The object being to prevent a bar of the Statute of Limitations within the next two years. P. VANCLIEF."

"October, 18th, 1876.

And also indorsed as follows:

"FOREST CITY, May 16th, 1877.

"P. VANCLIEF—Pay the within to W. P. Koutz, without recourse. JOHN ROSS,

"Administrator of the estate of John Koutz, deceased."

The following account and promise in writing was then introduced in evidence by the plaintiff:

"P. Vanclief to John Koutz, Dr.

"1873—February 1st.—To cash for amount of taxes on A.

"M. Hill Q. M. Co.'s property paid at your request..$43.02

"The above is correct, and I promise to pay the same.

"October 18th, 1876. P. VANCLIEF."

All the foregoing evidence was admitted against the objections of the defendant, upon grounds which it is now unnecessary to notice in detail.

Our conclusion, however, is that the effect of the renewal of the note was to extend the time of payment two years from the date of said renewal, and that therefore the action was prematurely brought. We are also of the opinion, that the plaintiff failed to prove that he was the owner, or entitled to bring an action in his own name alone for the recovery of said alleged indebtedness due upon said note and account. If it should be thought necessary and advisable to bring another action upon said note and account, a joint action in his name, and that of the other heir and distributee of said estate, or an assignment by her to him, would obviate this objection.

We think that the record of proceedings of the Probate Court were properly admitted in evidence, and that they established the due administration and distribution of said estate.

Judgment and order denying a new trial reversed.

MYRICK J., and THORNTON, J., concurred.

[No. 6,493.—Department No. 2.]

NATHAN *v.* DOANE ET AL.

CONFLICT OF EVIDENCE—FINDINGS—FRAUD AS TO CREDITORS.

APPEAL from a judgment for defendants, and from an order denying a new trial, in the Sixth District Court, County of Sacramento. DENSON, J.

The facts are stated in the opinion.

J. H. McKune, and *W. F. George*, for Appellant.

Joseph Naphtaly, for Respondent.

SHARPSTEIN, J.:

The plaintiff, a judgment creditor of one Justin Gates, seeks in this action to have a judgment against said Justin, and in favor of James H. Gates, entered previously to the entry of plaintiff's judgment, declared fraudulent and void as against the

plaintiff herein, and to have the defendants herein surrender the property which they acquired through a purchase at sheriff's sale upon an execution issued upon said judgment recovered by James H. against Justin Gates, to the Sheriff, who has in his hands an execution issued upon the judgment recovered by the plaintiff against said Justin Gates, to be sold upon said last-mentioned execution, and to have the proceeds of such sale applied to the satisfaction of said last-mentioned judgment; and if any part of said property has been sold by the defendants herein, that they be required to pay into court a sum of money equal to the value of the goods sold, to be applied to the satisfaction of said judgment, in favor of the plaintiff herein. All the allegations of fraud are denied by the defendants, and the Court found in their favor upon all the material issues, and rendered judgment in their favor. The plaintiff moved upon a bill of exceptions for a new trial, which the Court denied. From the judgment and the order denying a new trial this appeal is taken. The plaintiff relies upon the insufficiency of the evidence to justify the findings and judgment of the Court.

We have examined the evidence incorporated in the bill of exceptions, and find that there is some evidence to support each finding of the Court. Whether or not the findings are supported by a preponderance of evidence is not for us to decide. The plaintiff relies upon fraud, and it is incumbent on him to establish it. A court will never presume it. And there being evidence tending to prove that there was no fraud committed by the defendants, or any of them, in the procurement of the judgment which the plaintiff seeks to have declared fraudulent and void, we cannot disturb the findings and judgment of the Court below.

Judgment and order appealed from affirmed.

MYRICK, J., and THORNTON, J., concurred.

[No. 6,329.—Department No. 1.]

TAYLOR *v.* WARNAKY.

RIGHT OF WAY.—Where one grants land to another, which is wholly surrounded by other land of the grantor, or partly by land of the grantor and partly by land of a stranger, a "way of necessity" arises in favor of the grantee over the land of the grantor.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Twenty-second District Court, County of Sonoma. TEMPLE, J.

The facts are stated in the opinion.

W. W. Porter, and *J. G. Presley*, for Appellant.

The common law "right of way of necessity," if it ever had any force or existence in this State, did not exist when this action was commenced, as the sixth subdivision of § 1238 of the Code of Civil Procedure is a substitute for it. The principle does not prevail in any case where the statute provides a remedy by condemnation. (*Brewer* v. *Bowman*, 9 Ga. 37; *Harvey* v. *Thomas*, 10 Watts, 63; *Pacopson Road Case*, 16 Penn. 15; *Hays* v. *Reisher*, 32 id. 169; *Commonw.* v. *Inhabitants of Newbury*, 2 Pick. 51–7; *Commonw.* v. *Low*, 3 id. 408; Code Civ. Proc. § 1238; subd. 6 § 1241, § 1252.)

Johnson & Henley, for Respondent.

The Court found that there was a "way of necessity," and this finding is clearly sustained by the evidence. (Wash. on Easements, 3rd ed. 42, 43, 232–3, 237, 269; *Care* v. *Crafts*, 53 Cal. 135.)

MCKINSTRY, J.:

A "way of necessity" can only be created over one or two parcels of land of which the grantor was the owner when the same was conveyed or reserved; and it arises in favor of such parcel when the same is wholly surrounded by the grantor's other land, or partly by this and partly by land of a stranger. This arises from the effect of the grant or reservation of the

land itself, and is so far appurtenant to it as to pass with the land to another, provided he have no other way of access to the same. (Washburn's Easem. and Serv., side p. 163, and cases there cited.)

Both the plaintiff and defendant derived title from the same source. The grantors of plaintiff's immediate grantor were the owners of a tract which included both the lands of plaintiff and those subsequently by them conveyed to defendant—the latter adjoining those of the plaintiff, and lying between them and the county road. When the original owners conveyed to plaintiff's grantor, the tract conveyed was entirely surrounded by other lands of such owners, and the lands of third parties. Neither the plaintiff nor his immediate grantor acquired a right of way through the lands of any person other than the original owners. "It would be simply absurd under the common law to pretend that A. could, by any form of grant, create a servitude upon the land of a stranger in favor of land which he should convey to his grantee." (Id.)

The findings present all the facts essential to create a "way of necessity." The plaintiff is not driven to a proceeding to condemn the land on payment of its value, since the right of way was acquired by him and his immediate grantor as appurtenant to the grant of his land.

Judgment and order affirmed.

ROSS, J., and MCKEE, J., concurred.

[No. 6,310.—Department No. 1.]

MONTGOMERY *v.* SPECT.

MORTGAGE—DEED INTENDED AS A MORTGAGE—DEFINITION.—Whether a deed absolute in form is a mortgage, is a question of intention, to be determined from all the facts and circumstances of the transaction, taken in connection with the conduct of the parties after the execution of the deed.

ID.—ID.—PRESUMPTION.—In such cases, in order that the deed be held a mortgage, the central fact to be found is the existence of an indebtedness at the time of the transaction, (forming the consideration of the deed) and a continuation of the relation of debtor and creditor. If this is found, the inference is, that the deed was not made to transfer the title, but to secure the debt.

ID.—ID.—EJECTMENT—JUDGMENT.—In an action of ejectment, the defendant set up the defense that a deed from him, under which the plaintiff claimed, was in reality a mortgage; and the Court having found to that effect, the judgment was that the plaintiff, upon the payment of the debt within a specified time, should convey to the defendant, and that if the defendant, within the time specified, failed to pay the debt, the affirmative relief demanded by him should be denied, and his bill asking for the same be dismissed, and upon appeal the judgment was affirmed.

APPEAL from a judgment for the defendant, and from an order denying a new trial, in the Tenth District Court, County of Colusa. KEYSER, J.

The complaint is in the ordinary form in ejectment. The defendant in his answer denies all of the allegations of the complaint, and sets up specially the facts stated in the opinion, and prays for affirmative relief.

The judgment is that the plaintiff, upon payment to him by defendant Spect of the sum of $9,000, convey to the said defendant the land in controversy; and, upon his failure to do so for ten days after tender to him of said sum, that a deed be executed by the clerk of the Court, appointed commissioner for that purpose; and that if the defendant fail to pay the plaintiff the said sum of $9,000 on or before the 10th day of September, 1879, then the affirmative relief demanded by him be denied, and his bill asking for the same dismissed.

The other facts are stated in the opinion.

W. C. Belcher, and *W. F. Goad*, for Appellant.

The evidence was insufficient to justify the finding, that the deed was intended to secure the payment of a debt, and so was

intended to be a mortgage. There was no subsisting debt or obligation from Spect to Montgomery. His obligations were settled and discharged at the delivery of the deed, and he contracted no new obligation to pay. (Civ. Code, § 2924; *Henley* v. *Hotaling*, 41 Cal. 28; *Page* v. *Vilhac*, 42 id. 75; *Koch* v. *Briggs*, 14 id. 256; *Ford* v. *Irwin*, 18 id. 117; *Farmer* v. *Grose*, 42 id. 173; *Conway* v. *Alexander*, 7 Cranch, 218; *Glover* v. *Payne*, 19 Wend. 518; *Robinson* v. *Cropsey*, 2 Edw. Ch. 138; *Magee* v. *Catching*, 33 Miss. 672, 693; 1 Greenl.; Cruise's Digest, 562, note; *Hughes* v. *Sheaff*, 19 Iowa, 335; *Saxton* v. *Hitchcock*, 47 Barb. 220, citing 4 Kent, (144) note *c*; *Reading* v. *Weston*, 9 Conn. 143; *Snavely* v. *Peck*, 29 Gratt. 27, 35.)

A. L. Hart, *John T. Harrington*, and *Wm. G. Dyas*, for Respondent.

The findings were fully justified by the evidence. (*Kuhn* v. *Rumpp*, 46 Cal. 299; *Hickox* v. *Lowe*, 10 id. 207; 4 Kent, 143; *Sears* v. *Dixon*, 33 Cal. 326.)

McKEE, J.:

Whether a deed absolute in form be a mortgage, is a question of intention to be inferred from all the facts and circumstances of the transaction in which the deed was executed, taken in connection with the conduct of the parties after its execution. In such cases, the central fact to be found is, the existence of an indebtedness at the time of the transaction, and a continuation of the relation of debtor and creditor. If that fact be found, the inference deducible from it is, that the deed was not made to transfer the title to the land described in it, but was made for the purpose of securing the debt which the grantor owed to the grantee.

It is essential, say the Court in *Hanley* v. *Hotaling*, 41 Cal. 23, that there be an agreement, either express or implied, on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money. So, in *Snavely* v. *Peck*, 29 Gratt. 35, the Court of Appeals of Virginia say: "That it is essential to a mortgage that there should be a debt to be secured. It may be antecedent to, or

created contemporaneously with the mortgage." The only inquiry, then, necessary to be made is, whether the relation of debtor and creditor remains, and a debt still subsists between the parties. If it does, then the conveyance must be regarded as a security for the payment, and be treated in all respects as a mortgage. (*Robinson* v. *Cropsey*, 2 Edw. Ch. 138; *Slee* v. *Manhattan Co.* 1 Paige, 56.)

The fact of a subsisting debt, to secure the payment of which a deed of real property may be given, must be proved like any other fact in a case. "But," as Mr. Justice Gaston says, in *McDonald* v. *McLeod*, 1 Ired. Eq. 227, "in examining transactions between borrowers and lenders, and between necessitous men and their creditors, courts of equity, aware of the unequal relation of the parties, and of the facility by which the former may be surprised into improvident arrangements, and of the moral coercion which the latter can exercise over their apparent freedom of action, are particularly attentive to any circumstances tending to show an inconsistency between the form of an act and the intent of the parties, and will take great pains to get at the substance of what was done or intended to be done by them."

Examining by these rules the facts and circumstances of the transaction in which the deed in the case in hand was executed, we think that the fact of an indebtedness between the grantor and the grantee in the deed is fairly established by a preponderance of evidence. The defendant owed to the plaintiff an antecedent debt, which was secured by a mortgage upon a portion of the premises now in controversy. Upon that mortgage debt the plaintiff had brought an action of foreclosure, and obtained a decree, in which the Court found that there was due and owing to the plaintiff $6,648.87, for principal and interest, counsel fees and costs, and directed a sale of the mortgaged premises to satisfy the same. Defendant wanted another year to pay the amount, at 1½ per cent. per month interest, by giving another mortgage upon the same property. The plaintiff declined to take another mortgage, because, as he objected, the property was not worth enough to justify the expenses of another foreclosure and sale. Defendant offered to increase the security, by giving all the real property which he had—property esti-

mated by him to be worth $40,000, by the plaintiff at $10,000, and which the Court below found to be of the value of $25,000. To this the plaintiff seemed to assent. Both preferred that the transaction should take the form of a deed instead of a mortgage—the defendant, because he had been charged double taxation—taxes upon the land and also upon the mortgage; the plaintiff, because in that way he would avoid the expenses of a foreclosure and sale. The whole matter was referred to the agent of the plaintiff for consummation. The agent computed interest upon the amount of the decree up to the date of the execution of the deed, added the sum of $200, which his principal had advanced to the defendant for part payment of a judgment against him, making the sum of the indebtedness which the defendant then owed to the plaintiff $7,000. This amount was agreed to as correct, and was inserted as the consideration of the deed. Simultaneously with the execution of the deed, an agreement was executed and delivered to the defendant, conditioned for a reconveyance of the property upon payment of the sum of $7,000, with interest at 1½ per cent. per month, within one year from the date thereof.

There is, of course, no question as to the form of the transaction. The defendant is emphatic in his testimony as to his intention and understanding of the purpose for which the transaction was made to assume that form. The agent with whom he transacted it is undecided and more uncertain as to the purpose. When asked, in substance, whether he did or did not know that the deed was made to secure the payment of the $7,000, he answered: "Well, what I did in it I know. The work I did in it I know, and I thought I was taking a deed." And on recross-examination, he thus testified:

"Q.—When he came to you, did he propose to make a mortgage?

"A.—He said he would like to make a mortgage.

"Q.—You told him you would not take a mortgage?

"A.—I told him that I could not stand foreclosing; that the property was not worth it, and I would not take a mortgage. That was my direction from Montgomery.

"Q.—You told him you would take a deed—an absolute deed?

"A.—Yes, sir.

"Q.—And he agreed to that, did he?

"A.—He signed the deed. *I do not remember the conversation that took place about it. He signed the deed I had made out.*"

Spect gave no note or memorandum for the payment of the $7,000 and interest. Nor does the written agreement contain any promise by him to pay. But this circumstance does not make the conveyance less effectual as a mortgage, if, in fact, there was a debt. (*Flagg* v. *Mann*, 2 Sum. 533; *Scott* v. *Fields*, 7 Watts, 360.) Had there been such a promise, or if such a note or memorandum had been given, it would have been, in itself, strong, if not conclusive, evidence of the existence of a debt. (*Hickox* v. *Lowe*, 10 Cal. 197.) But, although there was no personal obligation on the part of Spect to pay the $7,000 with interest, there is one circumstance which tends to raise a presumption of loan, or indebtedness, and that is, that the sum to be paid by Spect, in case he desired a reconveyance, was the precise amount expressed as the consideration in the deed, with interest at 1¼ per cent. per month. This fact alone would be insufficient to show that the money to be paid was a debt. (*Farmer* v. *Grose*, 42 Cal. 169.) But when, in addition to it, the Court finds that the value of the land was $25,000, and it is proved that Spect remained in possession of it all, and made improvements on portions of it to the value of $3,400, and collected the rents and profits of it all, and occasionally sold some of the land, and received the proceeds of the sales, it is difficult to resist the conclusion that both parties really understood and intended the transaction to be a mortgage. Besides, Montgomery, at Spect's request, conveyed to the wife of the latter, without consideration, some portions of the property on which the improvements alone were assessed at $1,400, and he allowed judgments against Spect to be enforced against the property, which he afterward redeemed from the execution sales, and charged the redemption money to Spect. If the deed had been executed for the purpose of transferring the title of the grantor to the lands described in it, judgments against Spect would have been worthless, as Montgomery himself testified, for the deed included all real property which Spect

owned or was possessed of; yet, after the deed, Montgomery advanced money to and for him at 1¼ per cent. per month, paid taxes for him, on which he charged him two per cent. per month, and bought up claims in notes and judgments against him. It is not according to the ordinary course of things that a man would deal in that way with reference to property of which he believed himself to be the owner.

Moreover, on the 6th of October, 1876, before the expiration of the year mentioned in the agreement for the purchase of the lands, Montgomery made out and presented to Spect an account or memorandum of the principal and interest due upon the $7,000, and of the advances in money which he had continued to make for the latter from the date of the deed. The whole amounted to $8,485.90. Upon this amount Spect was credited with $2,209.18, which he had paid on the transaction from time to time during the year, leaving a balance due to Montgomery of $6,276.12. "This amount," says Montgomery, "was the balance that was between him and me at that time." For this balance Montgomery gave Spect another agreement, as follows: "To allow Spect to purchase all the interest which I now own in the real estate which is described in a deed from said Spect to me, dated October 11th, 1875, at any time between this date and the 6th day of January, 1877, by his paying to me the sum of $6,276.12, gold coin, together with interest on that amount from this date until paid, at the rate of one and one-quarter per cent. per month; and on his paying said sum to me, together with interest as above mentioned, and all sums which I may hereafter pay out on account of said real estate, with interest on such payments at the rate of two per cent. per month, I hereby agree to make him a good and sufficient quitclaim deed to said real estate. Should said Spect neglect or fail to purchase said real estate within the time specified, this agreement shall be void, and in no case shall be construed into a mortgage. October 6th, 1876."

The same course of dealings took place between the parties from that date until January 6th, 1877, when another settlement was had, and a balance struck of $6,950, and Montgomery extended the time for paying it another year, upon the usual terms, by giving a new agreement in writing in substantially

the same terms, except that instead of interest on the amount at the customary rates it was provided that Spect should pay $1,042, for rent of the lands, in monthly installments of $86.83. But this "rent" is the exact equivalent of the monthly rate of interest at which Montgomery loaned the money, and as was said in *Sears* v. *Dixon*, 33 Cal. 326, that itself is a strong circumstance to show the intention of the parties. This "rent" Spect paid regularly every month until January, 1878.

It may be that some of these facts are consistent with a conditional sale of the property, but it seems highly improbable that a business man would have dealt as he (Montgomery) did with the property, which he knew was his own, and which he had contracted to sell to another. Considering all the circumstances of the transaction, and the conduct and dealings of the parties in connection with it, we think it is clear that both parties understood the $7,000 was a subsisting debt, and that the deed, although absolute in form, was intended as security for its payment, and of any other sums which Montgomery might thereafter advance to or for Spect, according to their agreement. In a word, that the real transaction between them was one of mortgage, and not of sale.

There is nothing in the objection that Spect did not tender the amount of his alleged indebtedness, nor do anything else which excused him from making a tender, if the deed were a mortgage. There is no defense, and consequently no proof, of a tender. But it is averred in the answer, that about the 1st of June, 1878, Spect applied to the plaintiff for an account or memorandum of the balance claimed to be due on the indebtedness, including any advances which may have been made since the last settlement, and offered to pay when a deed was prepared under the conditions of the defeasance, but Montgomery refused to render any account or make any statement, claiming that the deed was absolute, and not a mortgage. This application was made, not for the purpose of a tender, but for the purpose of redemption. It was an offer to redeem, and, according to the prayer of his answer, the defendant seeks to redeem. (*Hughes* v. *Davis*, 40 Cal. 121; *Pico* v. *Gallardo*, 52 id. 206.)

An equity of redemption is inseparably connected with a mortgage. The right to foreclose and the right to redeem are

coexistent; and until the remedy to foreclose may be barred, the right to redeem may be exercised. As the deed in controversy was a mortgage, the mortgagor has a right to redeem his property from it upon payment of the indebtedness which it was intended to secure. This right was properly guarded by the Court below for the protection of the plaintiff; for the Court, according to the principles of equity, required the defendant to pay the indebtedness found due to the plaintiff within a certain time prescribed by the judgment. We see no error in the findings or judgment.

Judgment and order overruling motion for a new trial affirmed.

McKINSTRY, J., and ROSS, J., concurred.

[No. 6,481.—Department No. 1.]

DAVIS *v.* THE ROCK CREEK L. F. & M. CO.

DEFAULT — DISCRETION OF COURT. — *Held*, upon the facts of the case, that there was no abuse of discretion, on the part of the Court below, in setting aside a default.

CONTRACT OF CORPORATION — POWER — TRUSTEE — EVIDENCE — FIDUCIARY — CONSTRUCTIVE FRAUD.—By a unanimous vote of the trustees of the corporation defendant, it was resolved to borrow a certain sum of money, and to execute a mortgage upon the property of the corporation to secure the payment of the same—the money to be applied to the payment of the debts of the corporation—and to that end A. Wolf, president, and F., the secretary, were authorized to execute a mortgage in the name of the corporation. A. Wolf did not borrow any money, but he had purchased the debts of the corporation and assigned them to A. Wolf & Co., (of which firm he was a member) and the notes and mortgage were executed to A. Wolf & Co. to secure the said indebtedness. In an action to foreclose the mortgage brought by the assignee of the mortgagees, *held*, first, that the resolution did not authorize the execution of the notes and mortgage for any such purpose; and secondly, and apart from this consideration, the law would not permit one who acts in a fiduciary capacity thus to deal with himself in his individual capacity; and *held*, accordingly, that the Court below did not err in excluding the notes and mortgage from the evidence.

ID.—RATIFICATION.—*Held*, upon the facts of the case, that there was no ratification of the notes and mortgage.

APPEAL from a judgment for defendant, and from an order refusing a new trial, in the Second District Court, County of Butte. HUNDLEY, J.

The default was opened on the affidavits of Geo. Parry, a stockholder, and J. M. Bassett, the president of the corporation defendant.

The affidavit of the former stated that he was the principal stockholder of the corporation; that when he ascertained that suit had been commenced, he applied to Bassett to know whether he had been served, and was answered in the negative; that he had always intended to have the defendant enter an appearance, and came to Oroville for that purpose; that, up to the entry of the default, he did not suppose that any service had been made on the defendant; that the default had not been taken through any neglect or fault of affiant, but through the mistake of Bassett and his statement to affiant.

The affidavit of Bassett stated in effect, that no complaint was served upon him with the summons, and that he supposed the service was wholly invalid on that account, until better informed by his attorney after the entry of default; and that if he had supposed it was valid, he would have answered it. There was also a sufficient affidavit of merits.

The notes and mortgage were offered in evidence, and objected to by the defendants on the grounds indicated in the opinion of the Court; and the objections were sustained, the evidence excluded, and the plaintiff excepted.

On the trial, the witness Fairbanks, besides testifying as stated in the opinion, testified as follows:

"They (the notes and mortgage) were executed in the presence of all the trustees, and they consented thereto, to the best of my knowledge and belief."

Gray & Gale, and *I. S. Belcher*, for Appellant.

The Court erred in opening the default. (*Chase* v. *Swain*, 9 Cal. 130; *Bailey* v. *Tuffe*, 29 id. 422; *Reidy* v. *Scott*, 1 P. C. L. J. 165.) But the notes and mortgage were not void nor voidable, and the cases referred to were not in point. Wolf had a right to loan money to the corporation, or to advance money to pay its debts, and this was what he did; and the corporation had a right to repay him, or to give him its notes and mortgage to secure future repayment. (*Twin-Lick Oil Co.* v.

Marbury, 1 Otto, 587; *Smith* v. *Lansing*, 22 N. Y. 520; *Merrick* v. *Peru Coal Co.* 61 Ill. 478; *Hayward* v. *The Pilgrim Society*, 21 Pick. 270; *Ashurst's Appeal*, 60 Penn. 314; *Buell* v. *Buckingham*, 16 Iowa, 284.)

There is no pretense that there was anything fraudulent or unfair in the transaction. There is no dispute that Wolf & Co. paid out the $12,895 for the company, and that the company had the full benefit of the money. There is no denial that all the trustees and stockholders were present, and knew and approved of all that was done. "They (the notes and mortgage) were executed in the presence of all the trustees, and they consented thereto, to the best of my knowledge and belief." (Civil Code, § 2232; Story on Agency (6th ed.) § 210; Field on Corporations, §§ 163 to 167; Green's Brice's Ultra Vires, p. 463, *et seq.*)

J. M. Burt, and *Harrison & Harris*, and *F. C. Lusk*, for Respondents.

All contracts made by an agent with his principal, or by a trustee with his *cestui que trust*, are presumed to be fraudulent, even in cases where the principal and agent both participated. (Story Eq. Jur. § 311; Story on Agency, § 212; *Comstock* v. *Comstock*, 57 Barb. 453.)

In executing this mortgage, A. Wolf sought to secure to himself an advantage not common to all of the stockholders, and was guilty of an unauthorized act, and violated a plain principle of equity applicable to trustees, and the act was void. (*Koehler* v. *Black River Falls Iron Co.* 2 Black U. S. 721; Field on Corp. § 174; *Hoyle* v. *Plattsburgh R. R. Co.* 54 N. Y. 314.)

These notes and mortgage are against public policy and void, and could not be enforced even if the presumption of fraud were overcome. (*Aberdeen R. R. Co.* v. *Blaikie*, 1 McQueen's Rep. 461; *Pickett* v. *School District*, 25 Wis. 551; Story on Agency, §§ 9, 10, 210, 211; *Bunker* v. *Miles*, 30 Me. 431; *Walker* v. *Palmer*, 24 Ala. 358; *Andrews* v. *Pratt*, 44 Cal. 309; *Wilbur et al.* v. *Lynde & Hough*, 49 id. 290; *San Diego* v. *S. D. & L. A. R. R. Co.* 44 id. 106.

In the case of a trustee, it is not sufficient to show that no advantage has been taken, but the *cestui que trust* may set aside the transaction at its option." (Story Eq. Jur. § 311. See also: *Cane* v. *Lord Hare*, 2 Dow, 289; Story Eq. Jur. § 322; Story on Agency, § 212; *Comstock* v. *Comstock*, 57 Barb. 453.)

Ross, J.:

The complaint alleges that on the 14th day of June, 1877, the defendant corporation, for a valuable consideration, executed to A. Wolf & Co. three several promissory notes, each for the sum of $4,328.33, making in the aggregate the sum of $12,985, and to secure the payment of the notes executed on the same day to Wolf & Co. a mortgage upon the property of the corporation. The notes and mortgage were afterward assigned to the plaintiff, and not having been paid, this action was instituted to foreclose the mortgage. McGrath, who held a subsequent mortgage from the corporation, was made a party defendant. He answered, denying that the defendant corporation ever executed the notes and mortgage mentioned in the complaint, and setting up his own mortgage. The default of the defendant corporation was entered, which was afterward, on motion, based upon affidavits, set aside by the Court, and an answer permitted to be filed by the corporation. By its answer the latter also denied that it ever executed, or caused or authorized to be executed, the notes and mortgage set out in the complaint as the basis of the plaintiff's action.

We think there was no abuse of discretion on the part of the Court in setting aside the default and permitting the answer to be filed.

The record shows that there were five trustees of the corporation, and that these trustees held all of its capital stock. The A. Wolf of the firm of A. Wolf & Co., to whom the notes and mortgage were given, was one of the trustees and the president of the corporation; and he, as president, together with one Fairbanks, as secretary, executed them on behalf of the corporation. As the basis of their authority so to do, the plaintiff offered and read in evidence, at the trial, a resolution of the Board of Trustees, in words and figures as follows:

"At a meeting of the Trustees of the Rock Creek Lumber, Flume, and Mining Company, held the 15th day of June, 1877, the following resolution was offered and unanimously adopted—the following trustees being present: A. Wolf, E. McGrath, H. A. Fairbanks, C. Wright, J. F. Dana:

"It is unanimously resolved by the Trustees of the Rock Creek Lumber, Flume, and Mining Company, a corporation, to borrow $12,985, and to secure the payment of said sum of money, to execute a mortgage upon the property of said corporation, said sum of money to be applied to the payment of the debts of said corporation, and to this end A. Wolf, president, and H. A. Fairbanks, secretary of said Rock Creek Lumber, Flume, and Mining Company, are hereby directed and authorized to make, execute, and deliver, and on behalf of said corporation, and as its act and deed, a mortgage upon said corporation property, and to affix to said mortgage and the notes which it secures, the corporate name of said corporation.

H. A. Fairbanks, Secretary.

Signed: A. Wolf,
H. A. Fairbanks,
E. McGrath,
C. Wright,
J. F. Dana,
Trustees."

It will be observed that the complaint alleges that the notes and mortgage were executed on the 14th day of June, 1877, whereas the resolution does not appear to have been adopted until the day following, June 15th. If, therefore, the plaintiff be held bound by the allegations of his complaint in this particular, there would appear no authority whatever for the execution of the notes and mortgage. It was said, however, at the argument, that they were not in fact executed until after the adoption of the resolution, and Fairbanks, the secretary and a witness for the plaintiff, *testified* that they "were executed in pursuance of the resolution or order of the trustees." We shall so treat them for the purpose of this decision.

Fairbanks, who was the only witness introduced on the trial, also testified that "A. Wolf did not borrow any money for the corporation that I know of, but purchased and assumed said

debts in the name of A. Wolf & Co., and for the payment of which said notes and mortgage were executed." The resolution did not authorize or contemplate the execution of the notes and mortgage for any such purpose. It authorized and contemplated the borrowing of $12,985, and to that end authorized and directed the president and secretary to execute for and in the name of the corporation, the necessary notes, together with a mortgage upon the corporate property. To borrow the money and to execute the notes and mortgage of the corporation to secure its payment was the sole power conferred on the president and secretary by the resolution. This they did not do, nor attempt to do, so far as the record shows. Instead, the president "purchased and assumed said debts in the name of A. Wolf & Co.," of which firm he was at the time a member, and then proceeded, in connection with the secretary, to execute the notes and mortgage in suit. This was clearly unauthorized by the resolution adopted by the Board of Trustees. (*Koehler* v. *Black River Falls Iron Company*, 2 Black, 719.) But apart from this consideration, the transaction in question cannot be upheld. The law, for wise reasons, will not permit one who acts in a fiduciary capacity thus to deal with himself in his individual capacity. The position of A. Wolf as a member of the firm of A. Wolf & Co., and his position as trustee and president of the corporation defendant, were inconsistent and conflicting. In purchasing the debts of the corporation in his individual capacity, it was to his interest to buy them at as great a discount as possible. The greater the discount the greater his gain. If he succeeded in purchasing the debts at *any* discount, to that extent he secured to himself an advantage not common to all of the stockholders. To permit this to be done would be to permit the violation of one of the plainest principles of equity applicable to trustees. In this particular case it does not appear that Wolf secured the demands against the corporation at any discount, neither does it appear that he did not. Nor does the policy of the law permit any inquiry into that question. Occupying as he did the position of trustee, he should not have put himself in a position adverse to his *cestuis que trust*. One cannot faithfully serve two masters whose interests are diverse. (*Andrews* v. *Pratt*, 44 Cal. 309; *San Diego* v. *S. D. and*

L. A. R. R. Co. 44 id. 106; *Wilbur* v. *Lynde*, 49 id. 290; *Picket* v. *School District No.* 1, 25 Wis. 552; *Cumberland Coal Co.* v. *Sherman*, 30 Barb. 553; *Aberdeen Railway Co.* v. *Blakie*, 1 MacQueen, 461; Field on Corp. §§ 174 and 175, and authorities there cited.)

Respecting the point made to the effect that the transaction was ratified by the corporation, it is sufficient to say that even if it admitted of ratification, there was no evidence of such ratification. (*Cumberland Coal Co.* v. *Sherman*, 30 Barb. 575, and authorities there cited.) It results from these views that the Court below was right in sustaining the defendant's objections to the notes and mortgage.

Judgment and order affirmed.

McKINSTRY, J., and McKEE, J., concurred.

[No. 6,887.—Department No. 2.]

HEARST *v.* EGGLESTONE ET AL.

ASSESSMENT — TAX DEED — ACTION TO QUIET TITLE.—In an action to quiet title, in which the defendant claimed under a tax sale and deed, and the plaintiff under a deed from parties doing business under the name of "The Blue Range Mining Company," it appeared that the property was assessed to "*The Blue Range Mining Company*" by direction of the plaintiff's agent, and that the certificate of sale and tax deed each recited the assessment as made to "*The Blue Range Mining Company*, and to all *owners and claimants known and unknown.*" *Held*, first, that the assessment was void, because "The Blue Range Mining Company" was not the owner, and was not a person who could own; and, secondly, that the certificate and sale were void for the additional reason that they recited an assessment to "The Blue Range Mining Company, *and to all owners and claimants known and unknown.*"

ID.—ID.—Under § 388 Code of Civil Procedure, where two or more persons transact business under a common name, they may be sued by the common name; but this does not vary the terms of § 3628 Political Code, by which the assessor "must assess such property to the persons who own, claim, or have the control thereof.

ID.—ID.—A void tax deed cannot be made valid by proof of a valid assessment.

APPEAL from a judgment for the defendant, and from an order denying a new trial, in the Tenth District Court, County of Sierra. KEYSER, J.

S. B. Davis, and *Louis T. Haggin*, for Appellant.

I. S. Belcher, and *Gray & Gale*, for Respondent.

MYRICK, J.:

This is an action brought to obtain a decree that plaintiff is the owner of the premises described in the complaint, and that defendants have no right, title, estate, or interest therein. Defendants deny plaintiff's ownership, and allege themselves to be the owners. The findings of the Court are in substance as follows:

That on the 6th of March, 1872, the premises were owned by Jones, Knuthson, and the defendant Mowry, who on that day sold and conveyed the same for $16,000 to plaintiff, who went into possession under the deed, which was duly executed and recorded; at which time, and for a long time prior thereto, said premises were known, managed and dealt with as the "Blue Range Mining Company's" claims, and by that name have been ever since known, managed, and dealt with; that for the State and county taxes for the fiscal year ending June 30th, 1874, the premises were assessed as the property of the Blue Range Mining Company; that at the time of the assessment, Knuthson was in possession as agent of plaintiff; that such proceedings were had, (the taxes not being paid) that on the 25th of February, 1875, the premises were sold by the Tax Collector to the defendants for $141.75, the amount of the taxes, costs, and charges; that November 17th, 1875, no redemption being made, the Tax Collector executed to the defendants a deed of the premises. After stating other matters relating to asserted relations existing between plaintiff and defendants, the Court rendered its judgment against plaintiff, and that defendants are the owners of the property.

It appears from the evidence, that the property was assessed to the "Blue Range Mining Company"; that the certificate of purchase and the deed executed by the Tax Collector, each contain the statement that the property was assessed to the "Blue Range Mining Company, and to all owners and claimants known and unknown." There is no pretense that the Blue Range Mining Company was a corporation.

The judgment is erroneous for two reasons:

1. The assessment was void, because the property was not

assessed to the owner. Hearst was the owner, and was in possession by his agent, with his deed duly recorded. The Blue Range Mining Company was not the owner; it was not a person that could own. It is true that the owner had permitted the business of the mine and ditches to be conducted, after his purchase, under the former name, but that act did not make the name a person. Under § 388 of the Code of Civil Procedure, where *two or more* persons transact business under a common name, the associates may be sued by the common name; but that section does not vary the terms of § 3628 of the Political Code, by which the Assessor "*must* assess such property to the persons who own, claim, or have the possession or control thereof."

Defendants are not aided by the fact that Knuthson, agent of the plaintiff, told the Assessor to assess the property as before, in the name of the company. Assessors should look to the *statute* for directions as to their duty, not to citizens. If he found Knuthson in possession, he not knowing that Hearst was owner, he might possibly have assessed it to him (Knuthson); but, instead of assessing either to the owner or to the person in possession, he named a myth. (*Crawford* v. *Schmidt*, 47 Cal. 617.) It would hardly be contended that a deed naming the Blue Range Mining Company as grantor would pass the title to the property. Section 3636 of the Political Code: "If the name of the absent owner is known to the Assessor, the property must be assessed in his name; if unknown, the property must be assessed to unknown owners." It seems to us that the statute is very plain in its directions.

2. Under the decision of this Court in *Grotefend* v. *Ultz*, 53 Cal. 666, the certificate and deed were both void. They recite that the property was assessed to the "Blue Range Mining Company, and to all owners and claimants known and unknown." A void deed cannot be made valid by proof of a valid assessment. (*Grim* v. *O'Connell*, 54 Cal. 522.

As the above errors are based upon the defendants' evidence, and the defendants' title appears to rest solely upon the assessment and proceedings thereon, the judgment and order denying the motion for a new trial are reversed, and the Court below is directed to render judgment for plaintiff on the findings.

SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 6,724.—Department No. 1.]

PULLIAM *v.* BENNETT ET AL.

EJECTMENT—CONSTRUCTION OF DEED.—G. being the owner of the Bosquejo or Lassen Rancho, agreed to convey to F. and W. 5,000 acres of land from the lower end of the rancho—500 acres to F. and 4,500 to W.—and in pursuance of the agreement, on the same day executed deeds to F. and W.; but, as to which was delivered first, the evidence was conflicting. The land conveyed to W. was described as "being 4,500 acres of land, taken off of the lower or most southerly portion of the rancho, * * * extending the full width of said rancho, from the westerly to the easterly boundaries thereof, and as far above the southerly line as shall be necessary to include * * * 4,500 acres of land, provided that no part of the land hereby conveyed * * * shall be or extend north of a straight line drawn from a point on the Sacramento, at a distance of one Spanish league south of the mouth of Deer Creek, due east to the easterly boundary line of said rancho; and if there should not be 4,500 acres of land between the said line and the southerly line of said rancho, the balance or residue of said land, to make up the said 4,500 acres, shall be taken off from the south-easterly corner of said rancho, in a square form." The land conveyed to F. was described as "being 500 acres of the rancho; * * * it being expressly understood that the said 500 acres shall be taken off of the south-westerly corner of said rancho, in a rectangular form, the frontage along the Sacramento River to be *not more than one-half the depth;* provided that no part of the land conveyed shall be or extend north of a straight line," etc.—(being the same as described in the first deed). In an action of ejectment brought by grantees of F. against subsequent grantees of G., *held*, that the deeds, being executed at the same time, were to be regarded as parts of one and the same transaction; and that, reading the deeds together, it must have been understood and agreed that the W. deed should be first located; and that the 500 acres conveyed to F. were to be located on the south-westerly corner of the rancho, *after* the location of the Wilson tract.

ID.—STATUTE OF LIMITATIONS—ADVERSE POSSESSION.—*Held, further*, upon the evidence, that the possession of the land by G., after his conveyance to F., was not adverse.

APPEAL from an order granting the plaintiff a new trial, in the Second District Court, County of Butte. KEYSER, J.

The facts are stated in the opinion.

Burt & Hamilton, and *Geo. Cadwalader*, for Appellant.

The deed to Ford conveys land in the south-westerly corner of the grant, and does not convey to him any portion of the land described in the complaint. The preponderance of the evidence was, that the Ford deed was to be delivered, and was delivered, first. Judge Sexton was the trial judge—the judge who listened to the witnesses, and weighed their testimony.

The Court has uniformly held, that if there was a conflict in the evidence, the decision of the judge who tried the case should not be disturbed. (*Gunter* v. *Sanchez*, 1 Cal. 45; *Lick* v. *Madden*, 36 id. 213; *Livermore* v. *Stine*, 43 id. 275; *Price* v. *Sturgis*, 44 id. 591.) The motion for a new trial should have been denied, and this Court will not regard the order of Judge Keyser, granting a new trial, as the decision of the Court trying the case.

Belcher & Belcher, for Respondents.

The deeds to Wilson and Ford having been made at the same time, and as parts of one transaction, are to be read together; and when so read, they show that it was intended and understood by the parties that the 500 acres conveyed to Ford should be located in a rectangular form at the south-westerly corner of the rancho, after the 4,500 acres to Wilson had been taken off. In each deed a similar expression is used; in one, "the south-easterly corner of said rancho," and in the other, "the south-westerly corner of said rancho." But the former evidently refers to the "south-easterly corner," where "the balance or residue" is to be located, if the whole 4,500 acres cannot be taken south of the line referred to.

McKEE, J.:

The action is ejectment. The land in dispute was originally part of the Bosquejo or Lassen Rancho, lying partly in the County of Tehama and partly in the County of Butte. Plaintiffs claim title to it by mesne conveyances from one Henry Gerke, who was the owner of it. The rancho was patented in 1862. But in 1856 there was pending between Gerke and one Henry Ford and H. L. Wilson a controversy for one-third of the rancho. This controversy was compromised and settled by Gerke agreeing to convey to Wilson and Ford 5,000 acres from the lower end of the rancho—4,500 acres to Wilson, and 500 acres to Ford. In performance of his agreement, Gerke had two deeds prepared, one to Wilson for 4,500 acres, and another to Ford for 500 acres. In the Wilson deed the land is described as follows: "All that certain tract or parcel of land situated in the County of Tehama, said

State, described as follows, to wit: being four thousand five hundred (4,500) acres of land taken off of the lower or most southerly portion of the rancho known as the Bosquejo or Lassen Rancho, extending the full width of said rancho, from the westerly to the easterly boundaries thereof, and as far above the southerly line of said rancho as shall be necessary to include or contain four thousand five hundred acres of land; provided, that no part of the land hereby conveyed, or intended to be conveyed, shall be or extend north of a straight line drawn from a point on the Sacramento River, at a distance of one Spanish league south of the mouth of Deer Creek, due east to the easterly boundary line of said rancho; and if there should not be four thousand five hundred acres of land between said line and the southerly line of said rancho, then the balance or residue of land, to make up the said four thousand five hundred acres, shall be taken off from the south-easterly corner of said rancho, in a square form; the westerly boundary of said last named square not to extend within one Spanish league of the Sacramento River."

The premises conveyed by the Ford deed are described as follows: "All that certain tract or parcel of land situated in the County of Tehama, said State, described as follows, to wit: being 500 acres of the rancho known as the Bosquejo or Lassen Rancho. It being expressly understood that the said 500 acres shall be taken off of the south-westerly corner of said rancho in a rectangular form, the frontage along the Sacramento River to *be not more than* one-half the depth. Provided, that no part of the land hereby conveyed, or intended to be conveyed, shall be or extend north of a straight line drawn from a point on the Sacramento River one Spanish league south of the mouth of Deer Creek, due east to the easterly boundary line of said rancho."

Both deeds were executed on the 17th of December, 1856. There is some conflict of evidence as to which of them was first delivered; Wilson claiming that his deed was delivered before the Ford deed; Gerke that both deeds were delivered on the same day, but the Ford deed before the other; and the attorney of Gerke also testified that the Ford deed was first delivered. The preponderance of evidence is that they were both delivered

before acknowledgment, and that there was not more than an interval of a day between their delivery. The Ford deed was acknowledged in January, 1857; Wilson's a month later, viz., in February, 1857. The Wilson deed was recorded in Tehama County, April, 1857; Ford's not until June, 1857.

The defendants are in possession of the land, claiming also under deeds from Gerke, made on the 6th and 10th of December, 1875; but when they obtained their deeds, the plaintiff's deed was of record, and they knew that the plaintiff claimed the land.

However the fact may be as to the delivery of the Ford and Wilson deeds, the question remains whether the description in the Ford deed includes the land in dispute? The deeds were executed by the same grantor, at the same time, and must be regarded as parts of one and the same transaction. In this view, the intention of the parties as to the lands which were intended to be conveyed becomes a material question. This should, if possible, be gathered from the deeds themselves, rather than by resorting to extrinsic evidence. If the lands conveyed are capable of identification by a construction of the deeds themselves, it will not be necessary to avail ourselves of evidence *aliunde*. "To give a proper construction to a description of property conveyed by deeds, the Court will place itself as nearly as possible in the position of the contracting parties, and their intent will be ascertained in the same manner as in the case of any other contract." (*Kimball* v. *Semple*, 25 Cal. 440.) Reading these deeds together as parts of one transaction, one thing is found which is common to both; that is, both tracts of land, or the entire 5,000 acres, were to be located between the southern line of the rancho, and a northern line to be drawn from a point on the Sacramento river, at a distance of a Spanish league south of the mouth of Deer Creek, due east to the easterly boundary line of the rancho. And one thing is peculiar to the Wilson deed—that is, if there shall not be found between this northern line and the southern boundary line, a sufficient quantity of land to make up 4,500 acres after the location of the 500 acres, according to its description, then, whatever might be necessary to make up the 4,500 acres was to be taken from the south-east corner of the rancho. The Ford tract, according to its descrip-

tion, was to be "taken off of the south-westerly corner of the rancho," in a rectangular form, with a frontage on the Sacramento River of not more than one-half the depth of the tract."

Both tracts were, therefore, to front on the river, and south of a line to be drawn eastward from a point on the river one Spanish league south of the mouth of Deer Creek. But, according to the description in the Wilson deed, the 4,500 acres were to be "taken off of the lower or most southerly portion of the rancho," extending its full width from east to west. There is no such description or call in the Ford deed. From its absence in this deed we infer that it must have been understood and intended between the parties that the Wilson deed should be first located, and that its position should be in the lower portion of the ranch, between the southern boundary line of the ranch, and the southern line of the Ford tract. Wilson, in fact, immediately located his 4,500 acres on that portion of the rancho, so as to leave the Ford tract of 500 acres to the north of the 4,500 acres, and south of the northern line, a Spanish league south of the mouth of Deer Creek; and has been, with the acquiescence of all the parties to the deeds, from the date of his deed, in the possession of that portion of the rancho. Giving to the Wilson tract that location as its natural position, according to the calls of his deed, it follows that the 500 acres were to be located on the south-westerly corner of the ranch after the location of the Wilson tract. Ford never took possession of his land, but the land described in the complaint is situated on the south-westerly corner of the rancho with reference to the Wilson tract, and between the northern line of Wilson's land and the location of the northern line, drawn from a point on the Sacramento River, a Spanish league south of the mouth of Deer Creek, and is, we think, identical with the land described in the Ford deed.

The defendants cannot invoke the Statute of Limitations as a bar to the plaintiff's action, because, although the defendants are in possession, claiming adversely to the plaintiff, yet that possession commenced on the 6th day of December, 1875, when they entered under their deeds from Gerke, and this action was commenced on the 7th of February, 1876. Gerke, it is true, had been in possession of the land by himself and tenants, from 1864

until he conveyed it to the defendants, and had cultivated it and paid the taxes upon it, but he never claimed to hold it adversely to Ford. The possession of the defendants cannot, therefore, be tacked on to that of their grantor, so as to render adverse the possession prior to the time when they received their deeds. (*McCracken* v. *City of San Francisco*, 16 Cal. 591.) And there being no adverse possession of the land for the period of time prescribed by the Statute of Limitations, it follows that the cause of action was not barred. (*Thompson* v. *Pioche*, 44 Cal. 517; *Same* v. *Felton*, 54 Cal. 547.)

Order granting a new trial affirmed.

McKINSTRY, J., and ROSS, J., concurred.

By the COURT (in bank):

The petition for the hearing of this cause by the Court, in bank, is denied. We think the judgment rendered by Department No. 1, affirming the order of the District Court granting a new trial, correct, under the circumstances appearing in the record. But all that portion of the opinion of Department No. 1, respecting the Statute of Limitations, and the construction of the deeds in question, is withdrawn.

[No. 6,526.—Department No. 1.]

COLUSA COUNTY *v.* DE JARNETT.

BOARD OF SUPERVISORS—CLAIM AGAINST COUNTY—INJUNCTION.—The Board of Supervisors, in passing upon a claim against the county, act as a *quasi*-judicial body, and their allowance and settlement of the claim is an adjudication, which is conclusive.

APPEAL from a judgment for the defendant, on demurrer to the complaint, in the Tenth District Court, County of Colusa. KEYSER, J.

The claim of Dyas (which is attached to the complaint) does not state the date of the services, nor does it appear from the claim itself that the indebtedness accrued within the year be-

fore the presentation of the claim; but it appears, from the allegations of the complaint, that the services were, in fact, rendered within the year. The complaint alleges that the services were rendered under a private contract with the District Attorney, who paid him in full for the same, and that he never was employed by the county; and further alleges, that the District Attorney filed written objections to the claim, and notified the board that he desired to be present when it was passed upon, in order to contest it; but that the board allowed it without hearing any evidence, and without giving the District Attorney an opportunity of contesting it.

The other facts are stated in the opinion.

Jo. Hamilton, and *Jackson Hatch*, for Appellant.

The claim of Mr. Dyas is silent as to time when the last item or any part of his account accrued. The claim, therefore, does not show that it was presented within the time required by law. No intendments or presumptions can be indulged in to support the action of a Board of Supervisors. Every fact necessary to confer jurisdiction must affirmatively appear. (*Finch* v. *Tehama County*, 29 Cal. 455; *People* v. *El Dorado County*, 8 id. 61; Pol. Code, § 4072.)

The case comes within the exceptions to the rule, that the allowance of a claim against a county by the Board of Supervisors is conclusive. (*El Dorado County* v. *Elstner*, 18 Cal. 148; 1 Dillon Mun. Corp. § 412; *McKeen* v. *Turney*, Feb. 26th, 1879.) Section 4001 of the Political Code clearly sustains this action, and enjoined upon the District Attorney the duty of instituting it.

A. L. Hart, for Respondent.

The allowance of the claim by the board renders the matters set out in the complaint *res adjudicata*, and is conclusive. (*Tilden* v. *Supervisors of Sacramento County*, 41 Cal. 68; *Hornblower* v. *Duden*, 35 id. 664; *El Dorado* v. *Elstner*, 18 id. 144; *Falls* v. *Paine*, 23 id. 302.

By the COURT, (from the Bench):

The action was brought to restrain defendant, as County Auditor of Colusa County, from issuing a warrant in favor of W. G. Dyas, upon a claim in his favor, which had been allowed against the county for legal services rendered by him in behalf of the county, in an action to which it was a party. No contest was made against the claim itself. When the Board of Supervisors of the county allowed it, they acted as a *quasi*-judicial body, and their allowance and settlement was an adjudication of the claim, which is conclusive. (Subd. 12, § 4066, Pol. Code.)

There is nothing in the complaint to authorize the interposition of a Court of Equity, and we are of the opinion that the Court below properly sustained the demurrer to the complaint.

Judgment affirmed.

[No. 10,502.—Department No. 1.]

THE PEOPLE *v.* FRESHOUR.

WITNESS — SELF-CRIMINATION — PRIVILEGE. — If a witness discloses a part of a transaction, with which he was criminally concerned, without claiming his privilege, he must disclose the whole. He cannot, after voluntarily testifying in chief, decline to be cross-examined on the ground that his answers may criminate or disgrace him.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the County Court of Tulare. CROSS, J.

Atwell & Bradley, for the Appellant.

The Court erred in refusing to compel the witness Randall to submit to cross-examination, and in refusing to strike out his evidence. (*People* v. *Benson*, 52 Cal. 381; *People* v. *Devine*, 44 id. 460; *People* v. *Williams*, 18 id. 187; Code Civ. Proc. § 2048; 1 Greenl. Ev. § 446.)

The rule is well settled, that where a witness gives testimony to part of a transaction, without claiming his privilege, he should be compelled to state the whole, and submit to a full cross-

examination. (*Coburn* v. *Odell*, 10 Foster, N. H. 540; *Norfolk* v. *Gaylord*, 28 Conn. 309.)

Attorney-General, for Respondent.

MCKINSTRY, J.:

The convict Randall, who was a witness called by the prosecution, having testified very fully as to his own connection with the actual commission of the alleged crime—that he was present at and a party to the larceny charged against the defendant—was asked by counsel for defendant: "State the general plan which you and the defendant entered into with reference to stealing these cattle?" To which the witness said: "I decline to answer." The Court: "What is your reason for declining?" Answer: "On the ground that it would criminate me in other circumstances." By the Court: "In other crimes?" Answer: "Yes." The Court then said: "I have no power to compel the witness to answer any such questions." To which ruling defendant then and there duly excepted.

The witness should not have been permitted to separate the actual taking of the property from the plan of the parties to the taking. His recital of the alleged plan or agreement might have tended to show that the connection of defendant with the actual taking was innocent, as that he supposed the cattle to be the property of the witness, and was employed by him, or might have led to such expansion of the narrative by witness as would leave him open to contradiction, or to impeachment by reason of the improbabilities of his story. Defendant was entitled to a full history of all that tended to explain the nature and degree of his complicity with the acts of the witness. The scheme of the parties, and the acts following, were parts of one transaction, and when a witness voluntarily testifies in chief on a particular subject, he may be cross-examined on that subject, even though his answers may criminate or disgrace him. (*Norfolk* v. *Gaylord*, 28 Conn. 309.) If the witness had been compelled to give his version of the agreement, it would have aided the jury in determining how far his testimony was credible. He had already testified that there were *other* parties to the criminal agreement, but it was neither his moral duty nor legal privilege to protect

them at the expense of the defendant on trial. If, when he had given his version of the plan, he had stated there were no other parties to it than defendant and himself, he would have shown that this or his former statement was untrue; if he had named other parties, *they* might have been called to disprove the accusation, and thus discredit the whole of his testimony. It is enough, however, to say that he had already admitted that the conspiracy contemplated and provided for the commission of the particular overt act charged in the indictment. If a witness discloses a part of a transaction with which he was criminally concerned, without claiming his privilege, he must disclose the whole. (10 Foster, N. H. 540.)

Judgment and order reversed, and cause remanded for a new trial.

ROSS, J., and MCKEE, J., concurred.

[No. 6,553.—Department No. 2.]

GOODHUE *v.* KING.

ATTACHMENT — UNDERTAKING — BANKRUPTCY — JURISDICTION — SURETY. — In an action against the sureties in an undertaking given (under § 540 Code Civ. Proc.) to prevent the levy of an attachment upon the property of the defendant in the attachment suit, it appeared that the latter, within four months of the issue of the attachment, filed his petition in bankruptcy, and in due course made an assignment of his property; but that, intermediate the filing of the petition and the assignment, judgment by default was entered against him. *Held*, that proceedings in bankruptcy did not affect the jurisdiction of the District Court, and its judgment was therefore valid, and the plaintiff entitled to recover.

APPEAL from a judgment for the plaintiff, in the Fourteenth District Court, County of Placer. REARDON, J.

The undertaking sued upon was executed by D. A. Rice, defendant in the attachment suit, and by the defendant in this suit.

The other facts are stated in the opinion.

B. F. Myers, for Appellant.

The undertaking sued upon is not a forthcoming bond, but is conditioned to pay the judgment.

Hale & Craig, for Respondent.

The liability of the defendants herein was purely collateral, and the extinguishment of the original liability of Rice by the discharge in bankruptcy extinguished the liability of defendants. (Code Civ. Proc. § 540; *Loring* v. *Eager*, 57 Mass. 188; *Carpenter* v. *Turrell*, 100 id. 452.)

MYRICK, J.:

March 23rd, 1878, plaintiff commenced an action against one Rice, to recover $390.32, upon a promissory note, with interest and costs. On the same day an attachment was issued. March 25th, 1878, Rice and the defendants, King and Mitchell, gave a bond for the payment of any judgment which plaintiff might recover, and no property was seized under the attachment. Rice made no defense to the action, and on the 1st of June, 1878, plaintiff recovered judgment against Rice for $407 and $26.99 costs.

This action is upon the bond executed by Rice and the defendants. The defendants here set up the following as a defense and bar to the action: Before the recovery of the judgment, to wit, May 4th, 1878, Rice filed his petition in bankruptcy in the United States District Court, and was by the Court adjudged a bankrupt. In due course he executed an assignment of his property, and on the 16th of November, 1878, filed his petition for discharge, which is still pending.

The Court below gave judgment for the defendants. This was error. Rice did not plead, in the suit against him, the pendency of the bankrupt proceedings. It does not appear but that the plaintiff obtained leave of the United States District Court to prosecute his suit to judgment, to the end that he might avail himself of his security. The bond was not a forthcoming bond, but was a bond to pay any judgment that plaintiff might recover. He has recovered a judgment.

The proceedings in bankruptcy did not, *ipso facto*, affect the jurisdiction of the Fourteenth District Court; therefore its judgment cannot be collaterally attacked.

The cases cited by respondent, 100 Mass. 452, and 59 N. Y. 233, are not in point.

Judgment reversed, and cause remanded.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 6,326.—Department No. 2.]

BANK OF WOODLAND *v.* TREADWELL.

FORECLOSURE OF MORTGAGE — ATTORNEY'S FEES — PENALTY — FINDINGS.—In an action to foreclose a mortgage which provided for an attorney's fee, the answer alleges that the plaintiff's attorney received a regular salary in compensation for all his services, and that the plaintiff had not agreed or become liable to pay him any compensation for his services in the action; but the Court failed to find upon the issue, and allowed the attorney's fee provided for in the mortgage. *Held*, that the judgment should be reversed for want of sufficient findings; that the plaintiff was not entitled to an allowance for attorney's fees, except for such sum as it had paid or become liable to pay to its attorney.

APPEAL from a judgment for the plaintiff, in the Sixth District Court, County of Yolo. DENSON, J.

The facts are stated in the opinion.

W. C. Belcher, for Appellant.

The findings are insufficient. (*Ladd* v. *Tully*, 51 Cal. 277.) Under the provisions of the act, (Stat. 1873–4, p. 707) counsel fees can only be allowed in case the plaintiff has paid or become liable to pay such fee under that act. The provision in the mortgage is to be treated as a penalty, and the rule in such cases is universal, that no more than actual damages can be recovered. (Story Eq. Jur. §§ 1313–1316; 3 Pars. on Cont. 156–163; Civ. Code, § 3369.)

C. P. Sprague, for Respondent: Cited Stat. 1873–4, p. 707.

MYRICK, J.:

This is an action to foreclose a mortgage. The mortgage contained the following provision: "And we do hereby agree that in case of a foreclosure of this mortgage, the holders thereof shall be entitled to recover upon this security the sum of $100, United States gold coin, as counsel fees, in addition to costs allowed by law."

The answer contains the averment that the attorney for the plaintiff herein is a regular paid employé of plaintiff, employed by it to perform such legal business, conveyancing, and searching of records, as may be required of him, and receives for all his services the fixed sum of $10 per month, and no more; that his services in this cause are a part of his services so contracted by him to be performed, and plaintiff has no contract to pay or become liable to pay to him, or to any other attorney, any fees or compensation whatever for any services in the above-entitled cause other than his salary as aforesaid."

The Court found "that all the allegations of the complaint are true, and all the allegations and denials of the answer contradicting the complaint in any respect are untrue."

This is not a finding upon the issues tendered by the answer as above given; the judgment must therefore be reversed for want of sufficient findings.

Upon the case, as presented by the bill of exceptions, we are of opinion that plaintiff is not entitled to recover any sum as counsel fees. Plaintiff is not an attorney, and therefore cannot be allowed counsel fees for its own services; it cannot be allowed any sum for counsel fees for services rendered or to be rendered to it by an attorney, unless that attorney be entitled to receive it to himself. The object of the law allowing counsel fees is not to afford an opportunity, under cover of the name, for a speculation on the part of the creditor, but to reimburse him, in a proper amount, for a sum which he pays, or becomes liable to pay, or to relieve him of the burden of paying counsel fees. In this case the plaintiff has paid, and has become liable to pay nothing as counsel fees. It is true plaintiff pays its attorney $10 per month for various legal services, but it does not appear that that sum can be at all apportioned to the services ren-

dered herein. Neither does it appear that the sum allowed by the Court below—$100—will belong to the attorney, or will receive any other direction than to go to plaintiff. (*Patterson* v. *Donner*, 48 Cal. 369.)

Judgment reversed, and cause remanded.

SHARPSTEIN, J., and MORRISON, C. J., concurred.

[No. 6,559.—Department No. 2.]

GEE *v.* TERRIO.

BILL OF EXCEPTIONS. — A bill of exceptions settled and agreed to by the attorneys, but not signed by the judge, *held* to be insufficient, and the judgment affirmed.

APPEAL from a judgment of nonsuit in the Sixth District Court, County of Sacramento.

The facts are stated in the opinion.

L. S. Taylor, for Appellant.

Grove L. Johnson, for Respondent.

MYRICK, J.:

This is an appeal from a judgment of nonsuit. There is in the transcript what purports to be a bill of exceptions, settled and agreed to by the attorneys for the respective parties, but not by the Judge. The Code requires that the bill of exceptions be settled by the judge who presided at the trial, instead of by agreement of the parties. No error appears in the record.

Judgment affirmed.

SHARPSTEIN, J., and MORRISON, C. J., concurred.

[No. 6,755.—Department No. 2.]

COFFEY ET AL. v. GREENFIELD.

INTERVENTION.—In an action to obtain a decree that defendant held certain real property in trust for the plaintiffs, and to compel a conveyance, the appellant filed his complaint in intervention, setting up a mortgage of the premises by the defendant, and a foreclosure and sale to the intervenor. *Held*, that he was entitled to intervene because he was interested in the success of the defendant, and also because he had an interest in the matter in litigation.

ID.—Any interest in the matter in litigation is sufficient to entitle a party to intervene. The fact that the intervenor might protect that interest in some other way, is immaterial.

APPEAL by the intervenor, Philip Hiffner, from a judgment in favor of the plaintiffs, in the Second District Court, County of Butte. KEYSER, J.

The facts are stated in the opinion.

Jo. Hamilton, and *J. M. Burt*, for Appellant.

The Court erred in sustaining the demurrer to the complaint in intervention. (Code Civ. Proc. § 387; Story's Eq. Jur. §§ 404, 405; *Brooks* v. *Hager*, 5 Cal. 281; *County of Yuba* v. *Adams & Co.* 7 id. 35; *Dixey* v. *Pollock*, 8 id. 570; *Horn* v. *Volcano Water Co.* 13 id. 62; *Davis* v. *Eppinger*, 18 id. 379; *Coghill & Co.* v. *Marks*, 29 id. 673; *Spanagel* v. *Reay*, 47 id. 608; *Pochlmann* v. *Kennedy*, 48 id. 201; *Coburn* v. *Smart*, 53 id. 742.)

Gray & Gale, for Respondents.

Heffner has foreclosed his mortgage, obtained a certificate of sale, and in due time will be entitled to a deed of all Greenfield's interest in the property. His rights cannot be affected by this action.

SHARPSTEIN, J.:

The appellant Heffner filed his petition in intervention in this action, which was demurred to and the demurrer sustained, on the ground that it did not state facts sufficient to constitute a cause of intervention. The intervenor failed to amend, and judgment was entered against him, from which he appeals.

The intervenor alleges that he lent to the defendant a certain sum, and took as security a mortgage upon the premises involved in this action; that default was made in the payment of the sum so secured, the mortgage was foreclosed, the property sold and purchased at the sheriff's sale by the intervenor, who holds the sheriff's certificate thereof. He alleges matters in his petition, which, if proven, would defeat the plaintiffs' action, which was brought for the purpose of obtaining a decree that the defendant holds the title to said premises in trust for the plaintiffs, and that he, defendant, be compelled to execute a good and sufficient conveyance thereof to the plaintiffs. The counsel for respondents insist that this affords no ground of intervention. They urge that appellant's rights cannot be affected by the judgment in this action; that if the defendant had the title to the premises when he executed the mortgage to the intervenor, that a judgment in favor of the plaintiffs would not conclude the intervenor, in the event of his obtaining a sheriff's deed of the premises. All of which is undoubtedly true. But the fact nevertheless remains, that the intervenor is interested in the success of the defendant in this action. If the defendant succeeds in this action, the judgment will determine all claims of the plaintiffs to the property, and render the intervenor's title, if he obtain a deed from the Sheriff, as against them, indisputable. Besides, it does seem to us that the intervenor has an interest in the matter in litigation. And the Code does not attempt to specify what or how great that interest shall be, in order to give a right to intervene. Any interest is sufficient. The fact that the intervenor may or may not protect that interest in some other way is not material. If he "has an interest in the matter in litigation, or in the success of either of the parties," he has a right to intervene. In this case, the intervenor in his petition charges that the defendant is in collusion with the plaintiffs, and the facts which he alleges in support of those charges go very far toward supporting them. But we cannot see that they in any way strengthen his claim of right to intervene.

Judgment reversed and cause remanded, with directions to the Court below to overrule the demurrer to the petition of intervention in said action.

MYRICK, J., and THORNTON, J., concurred.

[No. 6,457.—Department No. 2.]

ELLIOTT *v.* WOHLFROM.

DIVORCE — FRAUDULENT JUDGMENT — APPEARANCE — ESTOPPEL — COMMON PROPERTY.—In an action of ejectment, in which both parties deraigned title under a deed executed May 15th, 1865, for valuable consideration, to one Amanda C., the defendant by a deed direct from her, and the plaintiff by a deed from J. C.—formerly her husband—the case turned upon the validity of a judgment of divorce rendered June 23rd, 1864, in a case brought by J. C. against Amanda C., in the State of Indiana, in which the latter appeared by attorney; but it appeared that the appearance of the attorney was without her knowledge or consent. *Held*, that the judgment was not void, but, at most, only voidable at her instance, and that it could not be attacked by her husband or his grantee.

ID.—FRAUD.—Fraud renders any transaction void at the election of the party defrauded; but the party by whom the fraud is perpetrated has not that election.

APPEAL from a judgment for the plaintiff, and from an order refusing a new trial, in the Sixth District Court, County of Yolo. SEPULVEDA, J.

The facts are stated in the opinion.

C. P. Sprague, for Appellant.

The same force and effect is to be given to the decree rendered in the Indiana court that would be given to it if it had been rendered in this State. (*Hampton* v. *McConnel*, 3 Wheat. 234; *Mills* v. *Duryee*, 7 Cranch, 481; *Finneran* v. *Leonard*, 7 Allen, 54; Bigelow on Estoppels, 195–200, 224, 258, and 262.) The Indiana judgment, not being void upon its face, cannot be collaterally attacked. (*Hall* v. *Hadly*, 6 Humph. 444; *Carpentier* v. *City of Oakland*, 30 Cal. 447; *Hahn* v. *Kelly*, 34 id. 402, 415.)

The appearance of the attorney in the Indiana divorce is conclusive even against the party not participating in the fraud, and the question of his fraudulent appearance cannot be inquired into in a collateral proceeding. (*Miller* v. *Ewing*, 8 Smedes & M. 421; *Warren* v. *Lusk*, 16 Mo. 102; *Baker* v. *Stonebraker*, 34 id. 172; *Landes* v. *Brant*, 10 How. 371; Bigelow on Estoppels, 144–5, and cases there cited; *Gray* v. *Dougherty*, 25 Cal. 266; *Garwood* v. *Garwood*, 29 id. 521;

Finneran v. *Leonard*, 7 Allen, 54; Freeman on Judgments, §§ 289, 334–5.

The Court granting the decree had jurisdiction of the subject-matter of the suit. (*Herron* v. *Herron*, 16 Ind. 129; *Ewing* v. *Ewing*, 24 id. 470.) Even though the judgment had been absolutely void, Chandler and his grantee are estopped from denying its validity. (2 Bishop on Marriage and Divorce, §§ 754 and 760–1; Freeman on Judgments, 118, 122, 249, 561; *Grignon* v. *Aster*, 2 How. 319; Bigelow on Estoppels, 35, 37, 38, 44, 45.)

D. W. Welty, for Respondent.

The facts show that the proceedings in the Indiana divorce case were a mockery of justice and a gross fraud. The record, when offered and any right claimed under it, may be impeached by oral, written, or other evidence. (*Borden* v. *Fitch*, 15 John. 121; *Starbuck* v. *Murray*, 5 Wend. 149.)

The right of courts to inquire into the jurisdiction of foreign courts over the parties, or either of them, is established by the cases, and also to show the want of authority of the attorney who appeared. (*Kerr* v. *Kerr*, 41 N. Y. 273; *Gleason* v. *Dobb*, 4 Met. 340; *People* v. *Dawell*, 25 Mich. 248; *Pennoyer* v. *Neff*, 5 Otto, 714.) As the record is not binding on Amanda J. Chandler, it is not binding on James S. Chandler, or the plaintiff. Estoppels must be reciprocal and binding on both parties. (Viner's Abr. "Estoppel"; *Welland Canal Co.* v. *Gudon*, 51 Ala. 377.)

SHARPSTEIN, J.:

This appeal is from a judgment and order denying a motion for a new trial in an action of ejectment. The appellant claims title under and from Mrs. Amanda J. Bingham, and the respondent claims under title deraigned from James S. Chandler.

The land was unsurveyed, and belonged to the Government of the United States until February, 1864.

In 1855 the said James S. Chandler and the said Mrs. Amanda J. Bingham were married to each other, and settled upon the land in controversy, and occupied the same in connection with other lands until February, 1864, about which time it was surveyed by

the Government, and became subject to pre-emption; and on the 18th of that month the said James S. Chandler left the premises and never returned to occupy them; never filed a declaratory statement, and did not take any steps whatever to procure a title to the land from the Government or otherwise.

On the 21st day of April, 1864, the said James S. Chandler filed a complaint for a divorce against his wife Amanda J. Chandler, (now Amanda J. Bingham) in the Court of Common Pleas of the State of Indiana, within and for Allen County of that State, and on the 23rd day of June, 1864, the said Amanda Chandler appeared in said court by her attorney, and answered the complaint so filed by a general denial, and during the same term of said court the bonds of matrimony then existing between said James S. Chandler and said Amanda J. were dissolved. It was proved by the respondent, against appellant's objection, that the attorney who appeared for the said Amanda J. in the suit for a divorce in the State of Indiana had no authority from her to appear for her in that proceeding, and that in fact she had no knowledge of the proceedings.

On the 25th day of October, 1864, the said Amanda J. Chandler commenced a suit for a divorce against the said James S. Chandler in the District Court of the Sixth Judicial District of the State of California, within and for the County of Yolo, and for cause of action against James S. Chandler alleged adultery with one Sarah Chandler, and alleged no other cause of action. These proceedings were pending until the 18th day of March, 1867, at which time a decree of divorce was granted in said suit, but the decree is silent as to any disposition of the community property.

During the pendency of the suit in Yolo County, one Francis Marion Elliott obtained title to the land in controversy from the Government of the United States, obtaining a patent therefor bearing date June 15th, 1876, and during the pendency of the same suit, May 15th, 1865, the said Francis Marion Elliott sold the premises to the said Amanda J. Chandler.

After the decree of divorce in Yolo County was entered, and on the 14th day of May, 1867, the said Amanda J. married one John Bingham, her present husband.

Continuously from May, 1865, until 1873, the said Amanda

J. resided upon the land with her husband, John Bingham. They received and enjoyed exclusively the rents and profits until that date. Their possession was open, notorious, and exclusive.

In September, 1871, Mr. and Mrs. Bingham mortgaged the land for the sum of $4,000, which mortgage was placed upon the records of the county. The land was assessed to them, or to one of them, continuously from 1865 until 1873, and the fact of such assessments appeared on record. September 27th, 1873, the said Mr. and Mrs. Bingham sold the land to the defendant, and continuously since that time he has held exclusive possession of the same.

On the 28th day of May, 1877, said James S. Chandler quit-claimed said land to the plaintiff, and this suit was commenced October 4th, 1877.

The Court found that the plaintiff was seized in fee and entitled to the land in controversy, and that the defendant withheld the possession thereof from the plaintiff, and judgment was accordingly entered in his favor.

Whether the Court erred or not, depends upon the effect which should be given in this action to the judgment of divorce obtained by the plaintiff's grantor in the State of Indiana. That judgment is not void. At most it is only voidable. Conceding that it is voidable, can the party who obtained it, or any one who occupies no better position in regard to it than the party who obtained it, attack and avoid it in a collateral action?

If it be voidable, it is solely so because the plaintiff's grantor obtained it by fraud. But is it voidable? Respondent's counsel say that it is, because "the Court never acquired jurisdiction over the person of Amanda J. Chandler; the attorney who filed her answer did so without her knowledge or authority." That might be sufficient to enable her to avoid the judgment if she chose to do so. But suppose that she does not. Suppose that she should choose to treat the attorney's appearance for her as if it had been authorized by her. Might she not? And if she did, would not that amount to a ratification of his action? He ostensibly appeared for her, and if she chooses to accept the result of his services while acting for her, who has a right to deprive her of it? Not the husband, at whose instance the attorney entered an appearance for her, nor the plaintiff in this action,

who was affected by that judgment to the same extent that his grantor was. It appeared to be valid upon its face; and if the plaintiff ascertained that it was not, it was not through the defendant or defendant's grantor that he found it out. He must have obtained the information from his own grantor, who had himself perpetrated the fraud, if any was perpetrated, in obtaining the judgment. We know of no principle upon which the plaintiff in that action of divorce could be permitted to impeach the judgment rendered in it, for the purpose of recovering property from the defendant in that action which he could recover on no other ground than that he had obtained that judgment by fraud. There is a maxim of law that "No man should take advantage of his own wrong." It seems to us that that maxim has been violated in this case. Fraud renders any transaction voidable at the election of the party defrauded. But we have yet to learn that the party by whom the fraud is perpetrated has that election. We had always supposed that if he overreached himself, the law would leave him to extricate himself as well as he might, without its aid. And so we still think. In this case, however, the defendant is an entire stranger to that judgment. If he had examined the record, and found that it was a valid judgment upon its face, he might have safely acted upon the presumption that it was a valid judgment. Whether he actually inspected the record or not, the law will not hold him to be affected with notice of any fact outside of that record of which he did not have actual notice. He is chargeable with what the record discloses, and with nothing beyond what it discloses, unless it be shown that he had actual notice of something outside which would render that judgment voidable. There is no evidence or even claim that he did have any actual notice or knowledge of the manner in which that judgment was obtained. The learned counsel for the respondent say that there is no proof that he ever saw that judgment or knew of its existence. That is immaterial. He stands in just as favorable a position as he would if he had actually inspected it before purchasing from one of the parties affected by it. In respect of public records, a person is no more affected by what he sees, than he is by what he might see if he examined them.

If the plaintiff in that divorce suit were the plaintiff in this

action, and the defendant in that action were the defendant in this, would a court permit the plaintiff to attack that judgment on the ground that he obtained it by fraud of which the defendant was not only innocent but ignorant? We think not. Well, the grantees of these respective parties occupy in this respect no better or worse positions than their several grantors would, if this action were between them.

The exception to the ruling of the Court upon the defendant's objection to the introduction of evidence to prove that the attorney who appeared for the defendant's grantor in the action brought by the plaintiff's grantor in Indiana for a divorce, did so without being authorized so to do by defendant's grantor, must be sustained; and for that error and the insufficiency of the evidence to justify the decision of the Court, the judgment and order denying a new trial must be reversed.

Judgment and order appealed from reversed.

MYRICK, J., and THORNTON, J., concurred.

[No. 6,393.—Department No. 2.]

SPARKS ET AL. v. BUTTE COUNTY GRAVEL MINING COMPANY ET AL.

MECHANICS' LIEN — ORIGINAL CONTRACTOR — DEFINITION.— Material-men furnishing materials for the construction of a building under a contract with the owner, and persons directly employed by him to work on the building, are not "*original contractors*," within the meaning of §§ 1187, 1194, Code of Civil Procedure, and therefore must file their claims within thirty days from the completion of the building.

APPEAL from a judgment for the plaintiff, upon demurrer to the answer, in the Second District Court, County of Butte. HUNDLEY, J.

The facts are stated in the opinion.

Gray & Gale, and *S. P. Hall*, for Appellants.

The plaintiff was an original contractor, and entitled to sixty days within which to file his lien. (Code Civ. Proc. §§ 1183,

1185, 1187, 1192–1197, as amended May 29th, 1874.) By § 1192 the persons entitled to liens are divided into two classes, viz., those *who contract with the owner*, and *those who do not*. All, "*except those who contract with the owner, are sub-contractors.*" By § 1192 we are informed who are the *original contractors* mentioned in § 1187. It follows, that if a person contracts with the owner, he is an *original contractor*.

Harrison & Harris, for Respondent.

The appellant was a *material-man*, and, as such, not *an original contractor*. (Code Civ. Proc. § 1187; 1 Bouv. L. Dict. 358.)

The terms *original contractor*, *sub-contractor*, *material-man*, *laborer*, etc., are employed throughout the law-books to designate distinct classes of persons. Section 1183, Code of Civil Procedure, makes the *contractor*, *sub-contractor*, or *other person having charge of the building*, the agent of the owner. Clearly the statute here regards the contractor as one having charge of the building, and as something more than an ordinary workman or material-man. Section 1193, Code of Civil Procedure, seems to fix this sense of the term beyond cavil. The Code requires all others than the original contractor to file within thirty days. (Code Civ. Proc. § 1187.)

SHARPSTEIN, J.:

The plaintiffs brought this action for the foreclosure of mechanics' liens upon the property of the defendant corporation, and the appellant was made a defendant, on the ground that he claimed some interest in or lien upon the property which the plaintiffs were seeking to foreclose their liens upon. Appellant, in his answer, admitted all the allegations of the complaint, except that his lien was subsequent and subject to the liens of the plaintiffs. That he denied. The respondents contend that the appellant is a "material-man," and not "an original contractor," and therefore should have filed his lien within thirty days of the completion of the building.

The defendant alleges that he entered into a contract with the corporation defendant, "under and by virtue of which he

furnished to said defendant certain materials to be used, and which were actually used, in the construction of a certain building, structure, or mining claim," upon premises owned by said corporation. He further alleges that he "has fully performed all the conditions of said contract on his part to be performed, and said contract was completed, and said building, structure, or mining claim was completed, on the 24th day of December, A. D. 1877.

"That said materials so furnished as aforesaid were worth the sum of $2,716.87, United States gold coin, and by the terms of said contract said defendant, the Butte County Gravel Mining Company, agreed to pay this defendant therefor the said sum of $2,716.78, in United States gold coin, within sixty days after the 21st day of December, A. D. 1877.

"That within sixty days after said contract was completed, to wit, on the nineteenth day of February, A. D. 1878, this defendant filed with the County Recorder of said Butte County, his claim, duly verified by his oath, containing a statement of his demand, after deducting all just credits and offsets, and all other statements required by the law in such cases to be made, which said claim was on the said 19th day of February, A. D. 1878, duly recorded in the office of the County Recorder of said Butte County."

These are followed by appropriate allegations, which it is not necessary to quote or refer to. The answer was demurred to by the plaintiffs, and the demurrer sustained, on the ground that the answer did not state facts sufficient "to constitute a cause of action, or to entitle the said defendant W. T. Garrett to the relief prayed for in this action, or to any relief whatever." Defendant Garrett failed to amend his answer, and judgment was thereupon entered against him. From that judgment this appeal is taken.

The appellant did not file his claim within thirty days, but did file it within sixty days, after the completion of his contract. If he is an "original contractor," within the meaning of that phrase as used in the Code of Civil Procedure, (§§ 1187, 1194) his lien was filed in time. Otherwise not. It is quite clear that no one employed by him in the preparation of the materials which he furnished, or from whom he obtained them, could by reason

thereof have acquired a lien upon the building as a sub-contractor. It is unnecessary, therefore, to designate him as an original contractor for the purpose of distinguishing him from a sub-contractor. If every person who furnishes materials to the owner to be used in the construction of a building is an original contractor, then every person directly employed by the owner to work on the building is likewise an original contractor, and in a case in which the owner should purchase all the materials used in the construction of, and employ all the men who worked upon the building, all who furnished such materials or performed such labor would be original contractors. This, as will be readily seen, would result in very serious complications. Under § 1183, Code of Civil Procedure, they would all have to be held agents of the owner for the purposes of the Mechanics' Lien law; and under § 1193 neither of them would be entitled to recover, upon a lien filed by him only, such amount as might be due him according to the terms of his contract after deducting all claims of other parties for work done and materials furnished. If all were original contractors, it might be difficult to adjust their claims in accordance with that provision of the law. And then, again, it is provided that in all cases where a lien is filed for work done or materials furnished to any contractor, he shall defend any action brought thereon at his own expense.

Unless the persons who worked for appellant upon the materials which he furnished to the corporation defendant, would have a lien upon the building in the construction of which they were used, for the value of their labor, then he is not a contractor within the meaning of that clause of the Code. Again, if he be an original contractor, his lien is subsequent to all other liens. (Code Civ. Proc. § 1194.)

We are satisfied that the appellant is not an original contractor within the meaning of the law, and that his claim of lien should have been filed within thirty days after the completion of the building.

Judgment affirmed.

THORNTON, J., and MYRICK, J., concurred.

[No. 6,672.—Department No. 2.]

THE PEOPLE *v.* LANSING.

DISTRICT SCHOOL TAX—ASSESSMENT ROLL—EVIDENCE.—Though the assessment roll may be *prima facie* evidence of its contents, it is not conclusive in a proceeding directly based upon its correctness. *Held*, accordingly, in an action to recover a district school tax, that it was error to exclude evidence offered by defendant to show that the assessment roll was simply copied from the assessment roll of the county, and that no assessment was in fact made.

ID.—NOTICE—PUBLIC PLACES—DEFINITION.—Notices of election were posted at a store and two saloons, occupying three of the corners formed by two roads crossing each other, and within a circumference of eighty feet; and the Court found that the notices were posted in three of the most public places in the district. *Held*, that the finding was justified by the evidence.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Tenth District Court, County of Colusa. KEYSER, J.

The facts are stated in the opinion.

W. F. Goad, *H. M. Albery*, and *W. C. Belcher*, for Appellants.

The election was void for want of public notice. (Pol. Code, § 1831.) The store and saloons at the corners were, in effect, *but one* place. Three notices within eighty feet of each other do not answer the requirements of the statute.

It was error to exclude the evidence offered by defendant to show that no assessment had been made. (Cooley on Taxation, 354–6; Cooley on Const. Lim. 368-9.)

Jackson Hatch, District Attorney, for Respondent.

MYRICK, J.:

This is an action to recover a tax levied upon the property of defendant to aid in the construction of a school-house. The answer presented the issue that the assessor of the district did not, for the purposes of the tax, assess the persons or property in said district. On the trial the defendant offered to prove that the entire assessment was simply copied from the assessment roll of the county, with respect to the names, the description and

valuation of the property; that the assessor, as assessor of the district, did not assess any of the persons or property in the district described in the assessment roll, but simply caused a copy to be made by the County Assessor. The Court sustained plaintiff's objection to the testimony, and defendant excepted.

The defendant asked the assessor (witness) the following questions:

"Did you make any one of the assessments in this book [the assessment roll] set out, as the assessor of the district?"

"Did you assess any of the property that is described in this assessment roll, as assessor of the district?"

Plaintiff's objection was sustained, and defendant excepted.

These rulings of the Court were error. The assessment roll may have been *prima facie* evidence of its contents, but was not conclusive in a proceeding directly based upon its correctness.

Another point is made by the appellant. It appears that the notices of the election were all posted at a small collection of houses at the crossing of two roads, one being posted on a store and the others on two saloons—all at the meeting of two roads and within a circumference of eighty feet. The Court found that notices of the election "were duly and regularly posted in three of the most public places in said school district." There was evidence to sustain the finding that these were the most public places in the district, and we cannot disturb the judgment on that ground.

By reason, however, of the errors above referred to, the judgment and order denying a new trial are reversed, and the cause is remanded for a new trial.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 6,915.—Department No. 2.]

WHITTLE v. RENNER.

APPEAL—SERVICE OF NOTICE—ATTORNEY—DEFINITION—DISMISSAL OF APPEAL.—The attorney referred to in § 940 of the Code of Civil Procedure (in the clause requiring the notice of appeal to be served "on the adverse party or his attorney") is the *attorney of record*, and a notice served upon any other, unless the objection is waived, is void.

MOTION to dismiss appeal.

There appears upon the answer, and upon the notice of intention to move for a new trial, and upon the statement, an acknowledgment of service, signed, "Edwin Shearer, Attorney for the Plaintiff"; and the findings and judgment recite, that E. Shearer appeared as counsel for the plaintiff.

The other facts are stated in the opinion.

C. Edgerton and *H. Edgerton*, for Appellant.

R. A. Redman, for Respondent.

THORNTON, J.:

In this cause a motion is made to dismiss the appeal taken from the judgment and from the order denying a new trial, on the ground that the notices of appeal were not served on the attorney of record of the plaintiff in the Court below, respondent here. T. A. Bantz was the attorney of record, and the notice of appeal was served on E. Shearer. There was no substitution of Shearer in place of Bantz.

It provided by § 940 of the Code of Civil Procedure, that "an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same or some specific part thereof, and serving a similar notice on the adverse party or his attorney."

In *Prescott* v. *Salthouse*, 53 Cal. 221, an appeal was dismissed where the notice of appeal was signed and service made by Julius Lee, Esq., who was not the attorney of record of the party on whose behalf the appeal was attempted to be taken.

The Code of Civil Procedure nowhere expressly requires that the notice of appeal must be signed by the attorney of record

of the party taking the appeal. We are not, however, disposed to question the correctness of the judgment in *Prescott* v. *Salthouse*.

The section from which the words above quoted are taken requires service of the notice "on the adverse party or his attorney." The attorney here referred to is the attorney of record. The service on the adverse party must be a service on him personally, and in this case there had been no such service. We find nothing in the record which shows a waiver of the service on the attorney of record.

The motion to dismiss the appeal is granted, and an order will be entered to that effect.

SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 6,636.—Department No. 2.]

MEDLEY v. ROBERTSON ET AL.

STATE LANDS — SURVEY — DEFINITION. — Sixteenth and thirty-sixth sections are deemed to be *surveyed*, for the purposes mentioned in § 3495, Political Code, only when the plat of the survey of the township has been approved by the United States Surveyor-General.

ID. — ID. — CASE OVERRULED. — *Dictum* to the contrary in Oakley v. Stuart, 52 Cal. 522, overruled.

ID.—ID.—APPLICATION TO PURCHASE.—The title to a particular 16th or 36th section does not vest in the State before the plat of the survey of the township has been approved by the United States Surveyor-General; and an application to purchase such land, made before the approval of the survey, is unauthorized and void.

APPEAL from a judgment for the defendant, and from an order denying a new trial, in the Eleventh District Court, County of El Dorado. WILLIAMS, J.

The facts are stated in the opinion.

W. C. Van Fleet, and *H. O. Beatty*, for Appellant:

Cited *Finney* v. *Berger*, 50 Cal. 248; *Middleton* v. *Low*, 30 id. 604; *Terry* v. *Megerle*, 24 id. 609; *Bernard's Heirs* v. *Ashley's Heirs*, 18 How. 43; *Oakley* v. *Stuart*, 52 Cal. 521.

Geo. G. Blanchard, for Respondent:

Cited *Oakley* v. *Stuart*, 52 Cal. 521; *Lessieur* v. *Price*, 12 How. 76–7; *Landes* v. *Brant*, 10 id. 348; 5 Cruise on Real Prop. 510–11.

MYRICK, J.:

This is an action to determine a contest arising in the Surveyor-General's office regarding the right of the parties to purchase the north half of a 36th section. The Court below filed its findings, upon which judgment was rendered for defendant. The following is a statement of the facts taken from the findings of the Court:

"The section was surveyed by a Deputy United States Surveyor, acting by authority, and all the lines thereof run and marked, and the corners established in the field, prior to September 24th, 1873; the field-notes of said survey were not returned to or filed in the office of the United States Surveyor-General for California, until after September 26th, 1873; the said survey and a proper plat were approved by the United States Surveyor-General for California, March 21st, 1874, and filed April 29th, 1874, in the United States Land Office. On the 26th of September, 1873, (after the survey in the field, but before the approval) the defendant, Robertson, presented and filed with the Surveyor-General of this State his affidavit and application to purchase of this State the said land, consisting of 320 acres; and August 4th, 1874, the application of Robertson was approved by the Surveyor-General of this State, a copy of which approval was forwarded to Robertson, and he made the first payment to the County Treasurer, and on the 3rd of October, 1874, the Register of the State Land Office issued to said Robertson a certificate of purchase. On the 18th of February, 1876, plaintiff made his affidavit and application to purchase the land of the State, which were, April 1st, 1876, presented to and filed by the Surveyor-General of the State, which application said Surveyor-General refused to approve, and this controversy thence arose."

It thus appears that after the survey was actually made, but

before the survey and field-notes were returned to, filed with, and approved by the United States Surveyor-General, defendant made his application; and plaintiff insists that the title to the land did not pass to the State until the approval, and that, therefore, defendant's application is void, notwithstanding the fact that his application was subsequently approved, and a certificate of purchase issued to him.

It has been more than once held by this Court that the State cannot convey title to the 16th and 36th sections, until after it receives the title, and that it does not receive the title to any specific land, until the plat of the survey has been approved by the United States Surveyor-General. (*Terry* v. *Megerle*, 24 Cal. 610; *Middleton* v. *Low*, 30 id. 596.)

The defendant claims to make out his right to purchase under § 3495, Political Code. Under that section lands must have been surveyed by the United States before an application to purchase can be made. The question for consideration, therefore, in this case is, when are the 16th and 36th sections to be deemed to be *surveyed* for the purposes mentioned in said § 3495.

In *Oakley* v. *Stuart*, 52 Cal. 522, it was recognized to be "the practice of the State Land Department to treat as properly filed, applications filed at any time after survey in the field and the approval thereof by the Surveyor-General"; and that under the public land system and practice of the Land Department of the United States, lands have always been treated as *surveyed* when the lines were run in the field, and monuments or marks established by the proper surveyor.

That point, however, was not necessarily involved in the decision of the matter in controversy in that case. It is true that in one sense lands may be said to be surveyed when the lines have been run and the corners established. To hold that such should be deemed to be a full and completed survey, so as to enable applications for purchase to be made, would practically be to make the acts of the Deputy Surveyor notice to the world, and to compel persons to follow him wherever he went, in order to ascertain what lines had been run and what corners had been established, and would give opportunity for acts of bad faith upon his part in giving private information to his friends

from which they would have an advantage over others. The Surveyor-General's office is a public office, and his records are public; and to hold that his approval is necessary to complete the survey would place all persons upon an equality, and would carry out the principle that where public officers act there should be a record of their acts, and a place where the record can be examined by all. The Surveyor-General is the officer charged with the duty of making the survey. He may employ deputies to work in the field, but until their work be approved by him his mind has not operated upon it.

In the field-notes at the bottom of the survey of the south boundary of the section appears the date "September 13th, 1873"; at the foot of the survey of the east boundary of the section appears the date "September 30th, 1873," and at the foot of the survey of the north and west boundaries of the section appears the date "October 1st, 1873." The Court, against plaintiff's objection, admitted parole evidence tending to show that the lines were run prior to September 24th, 1873. In this there was perhaps no error; but the fact that it was necessary to show by parole evidence, and very uncertain evidence at that, that the lines were run prior to the filing of defendant's application, when the field-notes show that three of the lines were run after his application, demonstrates very clearly the propriety of holding that the approval by the Surveyor-General constitutes the safer guide. In this case, as above stated, the field-notes, filed in the Surveyor-General's office, show that three of the lines were not run until after defendant's applications had been filed; defendant, to overcome this objection, offered evidence tending to show that when the three lines had been run the Deputy Surveyor wrote a letter to one Blair, stating the fact of the survey, who gave the letter to one Frazer, who, thereupon, drafted defendant's application, thus enabling defendant to rely upon evidence not existing in any record or in any office.

In *Finney* v. *Berger*, 50 Cal. 248, this Court held that the title to a particular section does not vest in the State before the plat of the survey of the township had been approved by the United States Surveyor-General, and the defendant's application to purchase, having been filed before the State had ac-

quired the title, was unauthorized and void. We see no reason to question the soundness of that decision.

Judgment and order reversed, and cause remanded, with direction to enter judgment in favor of plaintiff in accordance with the findings.

SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 6,603.—Department No. 2.]

PERKINS ET AL. *v.* ECKERT.

CONTRACT—AGREEMENT—INSTRUCTIONS.—In an action upon an account, the question was whether a bill of sale of a quantity of wheat, executed by the defendant to the plaintiffs, was an absolute sale in satisfaction of the debt, or was only by way of security; and the Court instructed the jury to the effect, that the bill of sale purporting to be an absolute sale, they should find it to be such, unless it appeared from a preponderance of evidence that it was given as security, *and that both parties so understood it*. *Held*, that the last clause of the instruction was erroneous.

INSTRUCTION.—An instruction is erroneous if there is no evidence tending to establish the hypothesis upon which it is based.

DELIVERY—CHATTEL MORTGAGE—LOSS OF MORTGAGED PROPERTY—INSTRUCTION.—By the terms of a chattel mortgage of wheat, the mortgagor was to harvest the same, and to deliver it into possession of the mortgagees; and, the question being as to who should bear the loss of a portion of the wheat, alleged to have been shipped by railroad to the place of destination agreed upon, but which did not arrive, the Court instructed the jury to the effect, that if the wheat referred to was shipped in the name of the plaintiffs, and the bills of sale taken in their name with their knowledge and consent, then they were in the possession and the owners thereof, and were liable for any loss resulting from their own negligence or carelessness, or that of their agents and employés. *Held*, that the proposition was not law, and that the instruction was erroneous.

APPEAL from a judgment for the defendants, and from an order denying a new trial, in the Second District Court, County of Butte. KEYSER, J.

The facts are stated in the opinion.

Belcher & Belcher, for Appellants.

Jo. Hamilton, *J. M. Burt*, and *Gray & Gale*, for Respondents.

THORNTON, J.:

The plaintiffs brought this action as partners on the 29th of January, 1878, to recover from the defendant the amount purporting to be due on a promissory note for $1,000, bearing date on the 21st day of September, 1880, payable in one day after date, and on alleged indebtedness of $3,439.80, balance due on account for goods, wares, merchandise, etc.

The defendant by answer admitted the execution of the note, but denied that it was due when suit was commenced.

Defendant further pleaded that on the 17th day of November, 1877, there was due to plaintiffs a balance of account amounting to $3,424.50, the amount due on the account having been reduced to the sum above mentioned by payment made before the 17th of November, 1877; that on the day last named, the defendant on payment of this balance executed to plaintiffs his promissory note for the amount of such balance, and that this note was accepted by plaintiffs in full payment and satisfaction of the balance due on the account above mentioned. The answer of defendant further states, that afterward, on the same day, defendant at plaintiffs' request executed to them a bill of sale, of which the following is a copy:

"OROVILLE, November 18th, 1877.

This is to certify that I have this day sold to Perkins, Logan & Co. 5,257½ sacks of wheat, weighing 697,930 pounds. This wheat is stored in the warehouse of the Grangers' Union of San Joaquin Valley, at Stockton, California. This sale is subject to my indebtedness at this date to the Stockton Savings Bank, as per my note in their possession. HIRAM ECKERT.

"Witness: MILTON J. GREEN."

The answer then proceeded to state that in consideration of the execution of this bill of sale to the plaintiffs, the plaintiffs agreed to assume and pay, and did assume and pay, all of defendant's "indebtedness to the said Stockton Savings and Loan Society, as per his said note then in its possession"; that plaintiffs further agreed to consider paid and discharged all accounts and demands against defendant, especially the balance of account above mentioned and the note executed by defendant for and on account of such balance, and certain other promissory notes

then owned and held by plaintiffs against defendant, and that plaintiffs did thereupon deliver the notes to defendant.

Defendant then proceeded to set up a counter-claim for the sum of $368 for services rendered plaintiffs, and as a cross-complaint averred that on the 25th day of November, 1876, he executed to the plaintiffs a chattel mortgage on the crop of wheat, barley, and hay growing upon a parcel of land in the County of Butte, to secure the payment by defendant to plaintiffs of the sum of $7,128.65 on the 29th of May, 1877, with interest, according to the true intent and meaning of a promissory note executed by the defendant to plaintiffs, dated 29th of November, 1876, and due six months after date, for the sum above mentioned, with interest, etc., and such advances as should be made by plaintiffs to defendant during the continuance of the mortgage; that by the terms of the said mortgage the defendant agreed to carefully tend and protect these crops while growing and until fit for harvest, and then faithfully and without delay harvest, thrash, clean, and sack the same, and deliver them immediately into the possession of the plaintiffs, to be held and disposed of by them for payment of the debts secured.

There are other conditions in the mortgage which need not be stated here, as they have no bearing on the questions to be determined in the cause.

The defendant further stated that he fully performed all the covenants and conditions contained in the mortgage contract by him to be performed; that he carefully tended and harvested the crops; that he thrashed and sacked them, and delivered them into the hands of the plaintiffs, to be held and disposed of as required by the terms of the mortgage; that by reason of the negligence and carelessness of the plaintiffs, 644 sacks of the wheat delivered to them, of the value of $1,798.69, were wholly lost and destroyed, to his damage in the amount just mentioned; that on a statement of accounts between him and plaintiffs, they are indebted to him in the sum of $1,123.69, for which he asks judgment.

The plaintiffs answered the cross-complaint, in which they denied the delivery of any grain whatever to them or either of them at any time, or that defendant lost any wheat whatever by the negligence, carelessness, or any act of them or either of

them. They admit the execution of the mortgage as alleged, and aver that on the 20th of July, 1877, defendant borrowed of the Grangers' Union of San Joaquin Valley at Stockton, upon his promissory note indorsed by them, the sum of $10,000 for his own use and benefit; that to secure the payment of this indebtedness, defendant in the month of August, 1877, shipped by California and Oregon Railroad from Nelson's Station to the Grangers' Union, above mentioned, at Stockton, 5,257½ sacks of wheat; that those sacks of wheat and no more were received by the Union at Stockton, and stand at that place in the name of plaintiffs for defendant's use and benefit, and to secure the payment of the note above mentioned; that on the 15th of October, 1877, the defendant was indebted to the Union in the sum of $12,547.53 for moneys lent and advanced, interest due, and freight paid by it for his use and benefit, and to pay this indebtedness he borrowed of the Stockton Savings and Loan Society at Stockton, the same sum; that at that time the wheat above mentioned was in the store-house of the Union at Stockton, stored in the name of the plaintiffs; that to enable the plaintiff to borrow this sum, they transferred the wheat to the defendant; that to secure the payment of the sum borrowed, defendant transferred the wheat to the Loan Society above mentioned; that on the 29th of January, 1878, the Loan Society sold the wheat to pay the indebtedness of defendant above stated, and fully accounted to the defendant for all of it. They further aver that they never had in their possession, or in their name, or under their control at any time, any of the wheat referred to, save the 5,257½ sacks, which were stored at Stockton by defendant in their names; that no part of this wheat was hauled, shipped, or stored by them or either of them; that the grain was under the control and management of defendant; that defendant never shipped more than 5,257½ sacks of wheat; they deny that the indebtedness set forth in the complaint was ever paid or discharged, and aver that it is now owing to them.

On the trial the jury rendered a verdict for defendant for $963.47, on which judgment was entered. Plaintiffs moved for a new trial. The motion was denied, and this appeal is prosecuted from the judgment and order denying a new trial.

The Court, at the request of defendant, gave several instruc-

tions to the jury, which the appellants contend are erroneous. These instructions are the *first*, *third*, and *sixth*. The first instruction is in these words:

"The plaintiffs admit the execution of the bill of sale of the wheat, set out in defendant's answer. It purports on its face to be an absolute sale of the wheat therein described, and you should find it to be an absolute sale of the wheat, unless it has been made to appear, from a preponderance of the testimony, that it was given as security, and that both parties so understood it."

This instruction was erroneous. There was evidence on the one hand that the document referred to was an absolute sale, and on the other that it was given as security for an existing indebtedness. The fact, then, to be determined by the jury, was whether the bill of sale represented an absolute sale of the wheat or was executed as security. This issue, like all issues in civil cases, was to be determined by the jury from a preponderance of the evidence. (Code Civ. Proc. § 2061, subd. 5.) A direction to this effect would have been correct. But the last clause in the instruction in effect was a direction to the jury that whether the bill of sale was taken as security was not to be determined upon a preponderance of the evidence unless "*both parties so understood it.*" By this instruction, if the jury came to the conclusion that plaintiffs understood it to be taken as security, and the defendant did not understand it, they were directed to find it to be an absolute sale. Such instruction withdrew from the jury the full consideration of the evidence upon the issue on which they were to pass, and, in our judgment, cannot be upheld.

Instructions *third* and *sixth* are as follows:

"*Third.*—If you find from the evidence that the defendant delivered four car-loads, or six hundred and forty-four sacks, of wheat to plaintiffs, and that plaintiffs employed the railroad company to transport the same to Stockton, in San Joaquin County, and that said wheat was lost or destroyed by reason of the negligence or carelessness of said plaintiffs or their employés, then in making up your verdict you should allow to the defendant the full value of said wheat at the time it was so lost or destroyed."

"*Sixth.*—If the wheat referred to in the evidence was shipped on the railroad in the name of plaintiffs, and bills of lading taken in their name with their knowledge and consent, then they were in the possession and were the owners thereof, and liable for any loss resulting from their carelessness or negligence, or the carelessness of their agents or employès."

There was no evidence showing or tending to show that plaintiffs ever employed the railroad company to transfer the wheat, referred to in the third instruction, to Stockton. The harvesting, cleaning, sacking, handling, and shipping the wheat were left entirely to defendant, who was at that time interested in the wheat as mortgagor. The receipts of the railroad company for the wheat were taken by the defendant at or about the time it was shipped, and afterward delivered by the defendant to the plaintiffs. The plaintiffs had nothing to do with the shipping of the wheat; this was wholly attended to by the defendant. The shipments were made in the name of the plaintiffs by defendant, and very properly so, as plaintiffs were the mortgagees of the wheat; but we find no evidence that they had anything to do with the shipping and obtaining the receipts. There is nothing in the case tending to show that the plaintiffs knew that the receipts were taken in their names, until they were handed to them by the defendant, and the evidence tends to show that the wheat had reached Stockton before the receipts were handed to them. We cannot see that the evidence tends to show anything more than a constructive delivery to the plaintiffs. There was no evidence which authorized the Court to submit to the jury the question whether or not the plaintiffs employed the railroad company to transport any wheat to Stockton. Nor was there evidence tending to show any such delivery to the plaintiffs as would render them liable, as is affirmed in the instruction. The instruction was therefore erroneous. (*Mecham* v. *McKay*, 37 Cal. 154; *Conlin* v. *R. R. Co.* 36 id. 404; *People* v. *Best*, 39 id. 690; *Mendelsohn* v. *Anaheim Light Co.* 40 id. 657.)

In the *sixth* instruction, the Court affirms as law the proposition that if the wheat was shipped in the name of plaintiffs, and bills of lading taken in their name, with their knowledge and consent, that they were then in possession, and were owners of

it. On the facts embraced in the proposition, the liability of plaintiffs is deduced. But the proposition is not law, and in this the instruction is erroneous.

The judgment and order denying a new trial are reversed, and the cause remanded.

SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 6,800.—Department No. 2.]

PIERCE *v.* SCHADEN ET AL.

NEW TRIAL—DISCRETION OF COURT.—A motion for new trial, upon the ground of insufficiency of the evidence, is addressed to the discretion of the Court, and an order granting a new trial on such ground will not be reversed unless there has been a manifest abuse of discretion.

NEGOTIABLE INSTRUMENT—PROMISSORY NOTE—NOTICE OF DISHONOR.—Notice of dishonor of a promissory note may be given verbally.

APPEAL from an order granting the plaintiff a new trial, in the Sixth District Court, County of Sacramento. DENSON, J.

The facts are stated in the opinion.

A. C. Freeman, for Appellant.

The granting of a new trial is not so purely a matter of discretion, that the Appellate Court will not reverse an order granting a new trial in opposition to established rules of law. (*People* v. *Superior Court*, 5 Wend. 114; 10 id. 286.) The Civil Code contemplates that a notice of dishonor should be in writing (Code Civ. Proc. §§ 3143–4); otherwise it cannot be delivered, folded, mailed, or directed, as provided in those sections.

L. S. Taylor, for Respondent.

THORNTON, J.:

Action against Schaden and Fuller as indorsers of a promissory note. The note was made by J. A. Gardiner in their favor in February, 1876, who afterward indorsed and delivered it to the plaintiff. The complaint sets forth that the note was, on

the day it became due, presented to the maker and payment demanded, and that the maker refused to pay it; of all of which the defendants were duly notified.

The defendant, Fuller, made no defense. Schaden answered, denying that the note was ever presented to the maker and payment demanded or refused, and further denied that he ever had any knowledge or notice of such demand or refusal. The Court rendered judgment for defendant. Findings were waived. Plaintiff moved for a new trial, which was granted, and defendants appealed from the order granting the new trial. The evidence was conflicting.

The motion for a new trial was made on the grounds that the evidence was insufficient to support the decision of the Court, and newly-discovered evidence, material, etc. It does not appear on what ground the motion was granted. If it was granted on the ground of the insufficiency of the evidence, it is well settled that a motion for a new trial on such ground is addressed to the sound legal discretion of the Court, and that an order so made will not be reversed on appeal unless it appear that there has been a manifest abuse of discretion. (*Phelps* v. *Union C. M. Co.* 39 Cal. 407; *Hall* v. *Bark Emily Banning*, 33 id. 522.) For all that appears in the record, the Court may have made the order here on that ground—and if so made, there was no abuse of discretion, and the order should not be reversed.

As regards the notice of dishonor of the note in suit, the testimony was to the effect that it was given orally to the defendant in person. And it is argued that under the provisions of the Civil Code, such notice can only be given in writing. We have examined the provisions of the Code on the subject, (§§ 3142–3–4) and we cannot see that they change the law, allowing such notice to be given verbally. As this latter point may arise on the new trial ordered, we have thought proper to dispose of it. (As to point that notice of dishonor may be given verbally, see 2 Daniel on Negotiable Instruments, § 972, and cases there cited.)

Order granting new trial affirmed.

SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 7,104.—Department No. 2.]

SHUGGART v. LYCOMING FIRE INSURANCE CO.

INSURANCE — POLICY — ASSIGNMENT — AGENT.— A policy of fire insurance to P. and E., partners, contained the provision, that upon the conveyance of the property insured, or the assignment of the policy, without the consent of the company indorsed thereon, the policy should be void; and also the further provision, that no agent was empowered to waive any of the conditions of the policy without special authority in writing from the company. The interest of E. in the property insured, and in the policy, was, without the knowledge or consent of the defendant, assigned to the plaintiff; but shortly afterward the local agent of the defendant was informed by the plaintiff of the transfer, and requested to have the proper indorsements made on the policy, which he promised within a day or two to do; and afterward two payments of premium were made by the firm of P. & S.; and also the policy was changed by the agent at the request of the assured, so as to transfer $25 insurance from a stable on the premises to the stock and machinery (the change being made by a writing across the face of the policy). In an action upon the policy for a loss, *held*,

1. That by the express provisions of the policy, the agent had no power to waive any of its conditions.

2. That the transfer by E. of his interest in the property, without the proper consent of the defendant, rendered the policy void as to the interest transferred.

3. That the condition of the policy in regard to the transfer of the property was not waived by the subsequent action of the agent so as to revive the policy.

4. That the payment and receipt of the premium, after the transfer to the plaintiff, did not estop the defendant from claiming a forfeiture.

5. That the Court below erred in instructing the jury, that if the agent knew of the transfer and approved the same, they should find for the plaintiff, as there was no evidence that he knew of it until long after it occurred.

6. That the Court erred also in refusing to instruct the jury, at the instance of defendant, that the promise of the agent to procure an assignment of the policy was not sufficient to entitle the plaintiff to recover, if no further steps were taken to procure the assignment.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Tenth District Court, County of Colusa. KEYSER, J.

The facts are stated in the opinion.

W. S. Goodfellow, for Appellant.

The local agent, Washburn, not having power to make contracts generally, could not bind the company by his consent to an assignment of the policy, nor could he waive the requirement of the policy that such consent be in writing and indorsed

on the policy. (Civ. Code, § 2542, annotated edition, notes; 2 Parsons' Contracts, 6th ed. 453; *Tate* v. *Citizens' M. F. Ins. Co.* 13 Gray, 79; *Ayres* v. *Hartford F. Ins. Co.* 17 Iowa, 189; *Harrison* v. *City Fire Ins. Co.* 9 Allen, 231; *Mentz* v. *Lancaster F. Ins. Co.* 79 Penn. St. 477; *Stringham* v. *St. Nicholas Ins. Co.* 37 How. Pr. 365; *Stringham* v. *St. Nicholas Ins. Co.* 3 Keyes, (N. Y.) 280; *Stringham* v. *St. Nicholas Ins. Co.* 4 Abb. Ct. App. Dec. 315; *Alexander* v. *Germania F. Ins. Co.* 66 N. Y. 464; *Rohrbach* v. *Germania F. Ins. Co.* 62 id. 61; *Merseran Phœnix M. L. Ins. Co.* 66 id. 274–280; *Bergson* v. *Builders' Ins. Co.* 38 Cal. 543.)

Hart & Hart, for Respondent.

The conduct of the defendant and its agents in agreeing to have the consent of the company indorsed, and in accepting premiums with full knowledge of the assignment and after the loss had occurred, amounted to a waiver of the condition in the policy, which required that in case of assignment the consent of the company should be indorsed on the policy. (*Illinois Fire Ins. Co.* v. *Stanton*, 57 Ill. 354; *Cumberland V. M. P. Ins. Co.* v. *Mitchell*, 48 Pa. St. 374; *Peoria Marine and Fire Ins. Co.* v. *Hall*, 12 Mich. 202; *Security Ins. Co.* v. *Fay*, 22 id. 467; *Viele* v. *Germania Ins. Co.* 26 Iowa, 9; May on Insurance, 618 *et seq.* 467–8; *Security Ins. Co.* v. *Fay*, 22 Mich. 473.)

Sharpstein, J.:

The facts of this case, about which there is no controversy, may be briefly stated as follows:

On the first day of July, 1878, the defendant issued a policy of insurance to Poulson & Eller upon their soda factory, machinery, materials, etc., situated at Colusa in this State, for the period of one year from said above mentioned date.

This insurance was effected through one Washburn, who was an agent of defendant, appointed by Brown, Craig & Co., its general agents, "with full power to bind proposals for insurance against loss or damage by fire in Colusa and vicinity, to solicit and forward applications for insurance, deliver policies

and renewals to applicants, and to collect and forward premiums on same, subject to such rules and instructions" as he might receive from the office of the said general agents.

The plaintiff alleges that Brown, Craig & Co. were the general agents of the defendant at San Francisco, and that Washburn was its special or local agent at Colusa. On the 28th of August, 1878, Eller conveyed his interest in the property insured to one Tharp, who on the 12th of September, 1878, conveyed the same to plaintiff, and he and Poulson thereafter carried on the business of manufacturing soda, as partners, until the 14th of December, 1878, when the property insured was destroyed by fire, resulting in a total loss.

The consent of the defendant to the transfer by Eller of his interest in the property insured to Tharp, or by Tharp to the plaintiff, was never indorsed upon the policy nor evidenced by any writing. There was no written assignment of the policy to either Tharp or plaintiff. After plaintiff became jointly interested with Poulson in the property, and before the fire occurred, the policy was changed so that $25 insurance on the stable upon the premises was transferred to the machinery and stock used for the manufacturing of soda.

The defendant paid to Poulson, after the fire, one-half of the amount for which the property was insured.

The plaintiff introduced evidence which tended to prove that there was a verbal transfer by Eller of his interest in the policy to Tharp, and that the latter in the same mode transferred it to plaintiff, and that Washburn, the local agent, had notice of those transfers some time after they were made, as well as of the transfers of the property insured; and that after they were made, plaintiff requested said local agent to have said transfers assented to by the defendant; and that said local agent agreed to attend to it as soon as he could get a little time; and that it would be all right in a day or two. Poulson testified that two payments on account of premium were made by him for himself and plaintiff after the transfer of the Eller interest in the policy to the plaintiff; and that he and plaintiff procured through said Washburn a policy in the Phœnix Insurance Company, of which he was the local agent, and said Brown, Craig & Co., were the general agents, upon a barn built by "Poulson & Shuggart";

and that said policy was made to said firm of Poulson & Shuggart; and that Washburn was the only party that he ever did any business with in relation to said insurance, "from the time that the policy was issued until the time of the fire, including the issuance of the policy."

Plaintiff testified that about three weeks after he had purchased the Eller interest in the property, Washburn told him (plaintiff) that the policy should be changed from Eller and Poulson to plaintiff and Poulson. After the fire plaintiff met Thomas and Haskell, two members of the firm of Brown, Craig & Co., general agents of defendant, and one of them said, "I do not know who Shuggart is. We do not know him." But either Thomas or Haskell said that he was going to do all that he could to get plaintiff's money. He thought as soon as he could write east to the head office, they would pay it.

When the plaintiff rested, the defendant moved for a new suit on the following grounds:

"1. That it had not been shown that there was any contract of insurance at all between plaintiff and defendant.

"2. That no assignment of the policy from Eller to Tharp had been shown, nor that defendant had assented to such assignment in writing on the policy, or at all.

"3. That no assignment of the policy from Tharp to Shuggart had been shown, nor that defendant's agent had assented to such assignment in writing or otherwise, nor had knowledge of such assignment at the time.

"4. That there was no evidence to show that Washburn, the local agent of the company, had in any manner waived any conditions of the policy, and no evidence to show that he had authority so to do."

This motion was denied, and the ruling of the Court thereon is assigned by the defendant as error.

Defendant then called Washburn, its local agent, as a witness, and he testified in substance, that he did not hear of Eller's sale of his interest in the property until about two weeks after Tharp sold to plaintiff, and that up to that time he was ignorant of any change in the ownership of it. He further testified, that plaintiff applied to him to have the policy so changed that he, plaintiff, would take Eller's interest in it; and that witness

told plaintiff that it would be necessary for him to obtain an assignment from Eller, as no change in the policies could be made without his consent. Witness further stated that he told plaintiff, that if he would give to him (witness) Eller's address, witness would send the policy to Eller, in order that he might indorse his consent on it, and that if he refused, witness would cancel it and issue a new policy to plaintiff. The witness positively denied that he ever promised to procure the assent of the defendant to the transfer of the property and policy to plaintiff, unless Eller's written assignment of the policy was first obtained. So far as the evidence introduced by defendant conflicts with that introduced by plaintiff, we are compelled on this appeal to accept the latter as the true version.

The Court instructed the jury as follows:

"A policy of insurance may be transferred by oral assignment when the policy is delivered for a valuable consideration, with intent to vest all the title thereto. If, therefore, the jury believe from the evidence that, at the date of the sale and transfer of the property insured, the owner of the policy herein sued upon delivered said policy to plaintiff, with intent to transfer the title thereto to plaintiff, that said transfer was for valuable consideration, and if the agent of the company knew of said transfer and approved the same, then the jury will find for plaintiff.

"If this policy was assigned by Eller, the insured, to plaintiff without the consent of the insurance company, the plaintiff cannot recover unless said assignment was afterward sanctioned by the company."

And the Court refused to give the following instructions, which defendant requested it to give:

"If this policy was assigned to the plaintiff by Eller, the assured, without the consent of the company, the plaintiff cannot recover.

"The promise of Washburn to procure an assignment of the policy is not sufficient to entitle plaintiff to recover on this policy, if no further steps were taken to procure an assignment of the policy."

The defendant excepted to the instructions given, and to the

refusal of the Court to give the instructions which defendant requested it to give.

The policy sued upon was signed by the president and secretary of the defendant at Muncy, Pa., and was countersigned at San Francisco, Cal., by Brown, Craig & Co., designating themselves as the general agents of the defendant, and by the terms of said policy it was not to be valid until so countersigned. No consent to the assignment or transfer of said policy to any person was indorsed thereon. The policy contained the following terms, stipulations, and conditions:

"This policy can only be assigned in case of actual sale of the property insured, which assignment must be approved by an officer or an agent of the company.

"If the property be sold or transferred, or any change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer, or executory contract, or conveyance, or if this policy shall be assigned before a loss without the consent of the company indorsed hereon, then and in every such case this policy shall be void.

"When property insured by this company shall be sold either by conveyance or under executory contract, or if alienated otherwise, this policy shall be void unless the policy is transferred to the purchaser with the consent of the company indorsed thereon in writing.

"The use of general terms, or anything less than a distinct, specific agreement clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

"No agent is empowered to waive any of the conditions of this policy, either before or after a loss, without special authority in writing from the company.

"And it is hereby understood and agreed by and between this company and the assured, that this policy is made and accepted in reference to the foregoing terms and conditions, which are hereby declared to be a part of this contract, and to be used and resorted to in order to determine the rights and obligations of the parties hereto in cases not otherwise specially provided for in writing."

As has been observed, the original parties to the policy of in-

surance in this case were the defendant and the firm of Poulson & Eller. But the plaintiff, before the loss, became invested with all the interest which Eller had in the property insured, and in the policy of insurance, so far as he could transfer his interest therein. It was stipulated by the original parties to the policy that if the property insured should be alienated, the policy should be void, unless transferred to the alienee, with the consent of the defendant in writing. We are unable to find any evidence in the transcript which tends to prove that the defendant ever consented in writing, or otherwise, to the transfer of the policy in this case to the plaintiff or to his grantor. But it is insisted, on behalf of the plaintiff, that he informed the local agent of the transfer of the property and assignment of the policy by Eller to Tharp, and by the latter to plaintiff, and requested said local agent to have the proper indorsements made upon the policy, and that said local agent agreed that he would within a day or two, and that two payments of premium were made by the firm of Poulson & Shuggart, successors to Poulson & Eller, and accepted by the defendant after it had knowledge that the interest of Eller had been transferred to plaintiff; and that the last payment was made to the local agent in the presence of the general agent; and that the acceptance of said premiums with knowledge of said transfer amounted to a waiver of the condition which required the consent of the company to the transfer to be indorsed on the policy in writing. There is, however, another stipulation which seems to militate against that view of the matter. We refer now to the following: "No agent is empowered to waive any of the conditions of this policy, either before or after loss, without special authority in writing from the company." It is not claimed that defendant in writing ever authorized any agent to waive any of the conditions of this policy. No case has been brought to our attention in which it has been held that a clause of this character in a policy may be wholly disregarded. In fact, it does not appear from the reports of the cases cited on either side, whether or not any of the policies sued upon in those cases contained such a clause. In *Illinois Fire Insurance Company* v. *Stanton*, 57 Ill. 354, the policy contained a condition that on the alienation or sale of the property insured, the insurance should cease and be void, unless the

policy should be duly assigned or confirmed by the consent of the directors, previous to the loss, and no policy should be regarded as assigned, unless the consent of the directors should be certified thereon by the secretary of the company. A sale of certain property insured by the company was about to be made, and before consummating it, the parties in interest went to the local agents of the company and told them that they were about to make the transfer. The agents had previously changed policies under similar circumstances. They told the parties that the policy would be good until it could be procured from St. Louis, and the formal consent of the company entered upon it. Before that was done the property was destroyed by fire. In that case, the Court said: "It is in proof that it had been the custom of the agents to give such consent, and their acts had always been ratified by the company. In giving such consent, the agents were, therefore, acting within the scope of their authority. Such agents will be held to have such power as the company knowingly permits them to exercise, and the fact that the company ratifies such acts on the part of their agents will be regarded as evidence of that authority in the agents." These remarks are not applicable to this case, in which there is no evidence that the agents of the defendant ever before consented to a transfer of property insured by it, with the understanding that the policy should inure to the benefit of the transferee, without any indorsement in writing to that effect. And we are unable to discover that the policy in that case contained a clause which prohibited the agents from waiving any condition of the policy without first being authorized to do so in writing. The question in this case is not, as it was in *Cumberland Valley Mutual Protective Co.* v. *Mitchell*, 48 Pa. St. 374, whether a ratification by the company of the agent's acts, under a mistake of facts, would revive the policy, because in this case there is no evidence which tends to prove that the defendant ever ratified the acts of its agent in respect to the transfer of the property and policy.

We do not think that the case of *Peoria M. & F. Insurance Co.* v. *Hall*, 12 Mich. 202, is at all analogous to this. In that case the agent of the company was informed, before the policy issued, that the assured kept and intended to keep gunpowder in his store, to which the agent assented, and agreed to have

written permission for keeping it inserted in the policy. The Court held that the keeping of gunpowder under those circumstances did not render the policy void, whether such permission was indorsed on the policy or not. In *Security Insurance Co.* v. *Fay*, 22 Mich. 467, the Court says: "The condition referred to contemplates that the consent of future insurance shall be given in advance, for the policy becomes void if there is any subsequent insurance without consent. When the policy was taken out in October in the Detroit company, this policy at once became void, according to our decision in *Western Mass. Ins. Co.* v. *Riker*, 10 Mich. 279." In *Viele* v. *Germania Ins. Co.* 26 Iowa, 9, the question whether an agent could waive a forfeiture occasioned by so using the premises as to increase the risk without the assent of the company indorsed on the policy, was very fully discussed. The Court said: "There was evidence tending to prove that the agent had full power to effect contracts of insurance; to fix rates of premiums, *to give consent to the increase of risk*, and change of occupation of buildings insured, to cancel policies in his discretion," etc. As there was evidence tending to prove that the agent, with a full knowledge of all the facts, consented to that use of the premises which it was claimed enhanced the risk, it was held a waiver of the condition that such consent should be indorsed upon the policy. In *Buckley* v. *Garrett*, 47 Pa. St. 204, the assured were partners, and had procured a policy which was to continue in force so long as the yearly payments stipulated in it were paid. With the consent of the company the assured assigned the policy to F. N. & Co., and with like consent they assigned to E. P., and with like consent she assigned it to C. H., who held it at the time of the fire. Seven years before the fire occurred, one of the partners to whom the policy was issued transferred his interest in the property to his copartner, who continued to pay the premiums up to the time of the fire. These payments were made to the treasurer, who was also a manager of the company. His office was in the same room with the secretary of the company, whose business it was to approve of transfers. The action was brought by the last assignee. The Court held that there was evidence which should have been submitted to the jury, of knowledge on the part of the company of the transfer,

and estoppel in consequence of successive receipts of the premiums after that.

In *Finley* v. *The Lycoming Mutual Insurance Co.* 30 Pa. St. 311, the Court said: "It was the express duty of the purchaser of the insured property to give notice to the company, and have the policy assigned according to its conditions, if he wished it continued for his use. The company were not bound to inquire anything about it. His paying assessments on the premium note given by his copartner, was no notice, or anything from which the company could infer a change in their former relation, even if notice in this way could avail, which it would not." In that case one of the partners had conveyed his interest in the property insured to his copartner, without first obtaining the assent of the insurer thereto, in the mode prescribed in the policy. In *Mentz* v. *Lancaster Fire Ins. Co.* 79 Pa. St. 475, the Court says: "The evidence offered and rejected was that the agent had told the assured that the proper indorsement had been made on the policy. Now, such a declaration made by a duly authorized agent or officer would clearly operate as an estoppel. It lulled the party to sleep by the assurance that the conditions of the policy had been complied with, and that his indemnity was secured." In *Worcester Bank* v. *Hartford Fire Ins. Co.* 11 Cush. 265, there was evidence tending to prove that the agent took the policy for the purpose of making the proper indorsement, and then returned it, saying, or giving the assured to understand, that the proper indorsement had been made. The Court held that that did not constitute a sufficient compliance with the condition which required an assent in writing to be indorsed upon the policy.

That the transfer by Eller of his interest in the property insured to Tharp without the proper consent of the defendant, rendered the policy void as to the property so transferred, does not admit of doubt. And there is no evidence tending to prove that the defendant or any agent of the defendant ever knew of that transfer until after it was made. The plaintiff testifies that he applied to the local agent for the consent of the defendant for the transfer to him, plaintiff, about three weeks after he purchased the property of Tharp. In answer to the question, "What did he (the local agent) say about it?" the plaintiff replied,

"He said that he would change it and see that it was all right. He said, 'I will change that for you on the very first day I have time. I am a little busy now, but I will change that for you in a few days.' I told him the sooner the better, because there was no telling what time something might turn up, and he said that he would attend to it in a few days; that he would attend to it right away." In view of the fact that the policy had become void, as to the interest which plaintiff had acquired in the property insured, it does not seem to us that the condition of the policy in regard to a transfer of the property could be waived so as to revive the indemnity as to that interest in this manner. If the agent had told the plaintiff that the proper assent in writing had been indorsed upon the policy, the question of estoppel might arise. But we are unable to see how it can, upon the facts before the Court.

The circumstance of the payment and receipt of the premium after the transfer of the Eller interest to the plaintiff, is relied upon to constitute an estoppel. We cannot view it in that light. The premium was actually paid by Poulson, one of the partners to whom the policy was issued. His interest in it was not affected by the transfer of his copartner's interest in the property to a third party. But so long as no change was made in the policy, it was incumbent on Poulson to pay the premium, which it called for, in order to prevent the policy from becoming wholly void.

Consistently with the views which we entertain of the facts of this case and the law applicable thereto, we must hold that the Court erred in instructing the jury that "if the agent knew of said transfer, and approved the same, then the jury will find for the plaintiff." There is no evidence tending to prove that the agent did know of the transfer until long after it had occurred. The real question was, whether or not his promise to have the policy changed bound the company, or estopped it from denying that it was changed according to that agreement. The instruction which defendant requested the Court to give, viz., "the promise of Washburn to procure an assignment of the policy, is not sufficient to entitle plaintiff to recover on this policy, if no further steps were taken to procure an assignment of the policy," should have been given. The instruction that "if this policy

was assigned by Eller, the insured, to plaintiff without the consent of the insurance company, the plaintiff cannot recover unless said assignment was afterward sanctioned by the company," cannot be considered the equivalent of the one which the Court refused to give. It left the jury to determine what would constitute a sanction by the defendant of the assignment, which, in the absence of any evidence of a direct sanction of it, was liable to mislead the jury.

For these errors, and the insufficiency of the evidence to justify the verdict, the judgment and order denying the motion for a new trial must be reversed.

Judgment and order reversed, and cause remanded.

MYRICK, J., and THORNTON, J., concurred.

[No. 6,024.—Department No. 2.]

BRONNER v. WETZLAR.

NEW TRIAL—DISCRETION OF COURT.—A motion for new trial, upon the ground of insufficiency of the evidence, is addressed to the discretion of the Court, and an order granting a new trial, upon such ground, will not be reversed, unless there has been a manifest abuse of discretion.

APPEAL from an order granting the defendant a new trial, in the Sixth District Court, County of Sacramento. DENSON, J.

The facts are stated in the opinion.

Armstrong & Hinkson, and *J. H. McKune*, for Appellant.

Geo. Cadwalader, for Respondent.

THORNTON, J.:

This is an appeal from an order granting a new trial. In an opinion which appears in the transcript, the learned Judge, in granting the motion, says: "I am now convinced that in making the second finding of facts, the evidence was misapprehended, and did not justify said finding. The finding should have been to the effect that defendant collected the rents in his

capacity as executor of the estate of John C. Keenan, and not as agent of the estate of Rosanna, or the executor thereof."

The defendant moved in the Court below for a new trial, on the ground, among others, that the findings of fact were contrary to and not supported by the evidence. In the statement the finding above referred to in the opinion of the Judge was attacked, on the ground that the evidence was insufficient to justify it.

It is well settled that a motion for a new trial on this ground is addressed to the sound legal discretion of the Court *a quo*, and that, on an appeal from such order granting a new trial, it will not be reversed unless it appear that there has been a manifest abuse of discretion. (*Phelps* v. *Union C. M. Co.* 39 Cal. 410; *Hall* v. *Bark Emily Banning*, 33 id. 524; *Pierce* v. *Schaden*, 55 id. 406.)

Upon an examination of the testimony in the transcript, we find that the only testimony as to the capacity in which defendant collected the rents referred to in the Judge's opinion quoted above, is that of the defendant himself, who deposed that he collected them as the executor of John C. Keenan.

We see no abuse of discretion by the Court below in making the order appealed from.

We do not intend by anything said in this opinion to be considered as approving the conclusion of the learned Judge of the Court below, as to the effect of the Statute of Limitations in barring a recovery from the defendant, if he made the collections referred to as the executor of John C. Keenan. We think it best, as the case is presented, to leave that question open.

The order granting the new trial vacated the judgment, and it no longer existed for the purpose of appeal.

The appeal from the judgment is therefore dismissed, and the order appealed from affirmed.

MYRICK, J., and SHARPSTEIN, J., concurred.

[No. 6,807.—Department No. 1.]

HAYES *v.* CAMPBELL.

FACTOR — DEFINITION — AGENT — FREIGHT — MARITIME LIEN. — The plaintiff forwarded wheat to M.'s Sons, commission merchants, to be shipped to Europe, and sold by them for his account; and M.'s sons shipped the wheat in their own name on a vessel chartered by them, of which the defendant was master—the defendant having no notice of the plaintiff's ownership. After the wheat was placed on board, and the vessel had received about half her cargo, M.'s Sons became insolvent, and broke the terms of the charter-party by refusing to proceed with the loading; and thereupon, after demand and refusal to deliver, the plaintiff brought his action, and replevied the wheat. *Held*, that M.'s Sons had authority to deal with the wheat as their own in any contracts within the scope of their agency, and that the plaintiff was bound by their action.

ID.—ID—ID.—ID.—MARITIME LIEN. — *Held, further*, that the defendant was entitled to a lien on the wheat for the payment of the freight and charges on the completion of the voyage.

ID.—ID.—ID.—ID. — ID. — CHARTER PARTY. — CONSTRUCTION. — *Held, further*, that the fact, that M.'s Sons had chartered the ship for the voyage, did not operate to deprive the owner of the benefit of the lien upon the cargo; that such a contract is a letting of the carrying capacity of the vessel, and not of the vessel itself, and is considered in law a contract of affreightment.

APPEAL from a judgment for the plaintiff, in the Sixth District Court, County of Sacramento. DENSON, J.

Milton Andros, and *Charles Page*, for Appellant.

Morgan's Sons were factors (Civ. Code, § 2026, and note to annotated edition; Parsons on Contracts, 91; Story on Agency, § 33); and, as such, had authority to enter into the contract of affreightment with the defendant. (Civ. Code, § 2319; *Green* v. *Campbell*, 52 Cal. 586.)

It is well settled at common law that a shipper cannot insist upon having his goods relanded, and delivered to him at the port of outfit, without paying the freight, and indemnifying the master against the consequences of any bill of lading signed by him. (*Campbell* v. *Conner*, 70 N. Y. 427; *Bartlett* v. *Carnley*, 6 Duer, 195, 200; *Tindal* v. *Taylor*, 4 El. & Bl. 219; *The Hermitage*, 4 Blatchf. 474; *The Nathaniel Hooper*, 3 Sum. 555; *Campbell* v. *Sunlight*, 2 Hughes, 9; *Ellis* v. *Willard*, 9 N. Y. 529; *Jordan* v. *Warren Ins. Co.* 1 Story, 342, 354; Angell on Carriers, § 368; Abbott on Shipping, 595; *Palmer* v. *Lorillard*, 16 John. 348; Hutchinson on Carriers, § 476, n. 1;

Kern v. *Deslandes*, 10 Com. B. N. S. 205; *Bird of Paradise*, 5 Wall. 545, 562; Story on Bailments, § 585; *Bulkley* v. *Naumkeag Steam Cotton Co.* 24 How. 386, 392.)

The cases relied upon by the plaintiff have not been followed by the later decisions, either in this country or in Europe. The defendant's lien was a valid lien, notwithstanding the charter to Morgan's Sons. There was no demise of the ship; the carrying capacity alone was let. (*Green* v. *Campbell*, cited *supra*; *Schooner Volunteer*, 1 Sum. 566; *Marcardier* v. *Chesapeake Ins. Co.* 8 Cranch, 49; Civ. Code, § 1959; *Certain Logs etc.* 2 Sum. 589, 594.)

J. C. Ball, *J. H. McKune*, and *W. F. George*, for Respondent.

The plaintiff being a stranger to the charter-party, his property cannot be taken, pledged, or held to satisfy the claim of appellant against Morgan's Sons. (*Wright* v. *Solomon*, 19 Cal. 76; *Everett* v. *Saltus*, 15 Wend. 475; *Saltus* v. *Everett*, 20 id. 267; *Warner* v. *Martin*, 11 How. (U. S.) 209.) The money for carriage was by the terms of the contract to be paid on delivery of the wheat in England. The failure to furnish cargo was a breach of the part of Morgan's Sons, sounding in damages, for which they were liable, but no lien could attach to the cargo for such damages. (*Wilson* v. *Hicks*, 26 Law J. (N. S.) Exc. 242; *Berley* v. *Gladstone*, 3 M. & Sel. 205; *Phillips* v. *Rodie*, 15 East. 261; *Olive* v. *Smith*, 5 Taunton, 56; *Hutton* v. *Bragg*, 7 id. 25; *Thompson* v. *Small*, 1 Com. B. 328.) A carrier has a lien for carrying the goods according to contract, not for having agreed to carry them. (*Higgins* v. *Bretherton*, 5 Car. & P. 2; 1 Esp. 119; Angell on Carriers, § 368.) For damages for any breach of contract he is relegated to his action at law; (*Phillips* v. *Rodie*, 15 East, 261; *Gray* v. *Case*, Law R. 6 Q. B. 522); and for failure to furnish cargo, no lien attaches to any goods. (*Pearson* v. *Goschen*, 17 Com. B. N. S. 352; *Wagner* v. *Smith*, 15 Com. B. 285; *Fry* v. *Bank of India*, Law R. 1 C. P. 689; *Chappell* v. *Comfort*, 10 Com. B. N. S. 802; 15 East, 547.) The owner of a ship cannot enforce a lien when he has chartered the ship to another, and the goods belong to a third person. (*Paul* v. *Birch*, 2 Atk. 621; *Kirchner* v. *Venus*, 12 Moore's P. C. 390.)

A lien for freight does not commence in any case till the ship breaks ground. (*Bailey* v. *Damon*, 3 Gray, 92; *Curling* v. *Long*, 1 Bos. & P. 634; *Clemson* v. *Davidson*, 5 Binn. 392; *Burgess* v. *Gun*, 3 Har. & J. 225; *Blossom* v. *Champion*, 37 Barb. 569.)

McKEE, J.:

The case presented for consideration is this: In 1874, E. E. Morgan's Sons were general shipping and commission merchants, doing business in the City and County of San Francisco, and engaged in buying and selling wheat, and in chartering vessels for the transportation of wheat from ports of California to ports of Europe, to be there sold by them for account of the owners. In that business they had chartered the ship *Charles Murdock*, of which the defendant in this action was master and part owner. The ship had proceeded to Vallejo to take on board a cargo of wheat for the charterers, according to the terms of the charter-party. Plaintiff being the owner of the wheat in controversy, forwarded it to Morgan's Sons at Vallejo, to be shipped to Europe, to be there sold by them for his account. Upon receiving the wheat, Morgan's Sons placed it on board the *Charles Murdock* in their own names, and the defendant received it on board, in the regular course of business, as the wheat of Morgan's Sons. When he received it he did not know that it belonged to the plaintiff, or to any other person or persons than Morgan's Sons; but he knew that they were shipping grain as the agents of the Grangers or farmers of the State. After the wheat had been placed on board, and the ship had received about half her cargo, Morgan's Sons became insolvent, broke the terms of their charter-party, and failed to proceed with the loading of the ship. Upon ascertaining that fact, the plaintiff demanded of the defendant the possession of his wheat, but made no tender to him then, or at any other time, of the freight or charges. The defendant refused to deliver the wheat, but was ready and willing to carry it under his charter-party, and the plaintiff brought this action of claim and delivery, in which the wheat was taken from the ship and delivered to the plaintiff. In shipping and relanding the wheat, the

defendant incurred no expense. The stevedores who loaded and relanded it were paid by the charterers or by the plaintiff.

Upon the case the Court below found, as a conclusion of law, that the defendant had never acquired any lien upon the wheat, and gave judgment for the plaintiff.

We are of opinion that the judgment is not supported by the findings; for it is apparent that the defendant, in receiving the wheat, dealt with Morgan's Sons either as owners of the wheat, (*Green* v. *Campbell*, 52 Cal. 586) or as agents, having power and authority to ship it and deal with it as their own (Civ. Code, § 2369); and, considered as owners or agents, with power to ship it in their own names, and sell and receive the money for it from the purchaser, the legal conclusion would be the same; for having power to do everything necessary or proper and usual, in the ordinary course of the business of shipping and selling the wheat, (§ 2319, Civ. Code) the plaintiff would be bound by their acts within the scope of their authority. Of course, as factors or agents they had no power to make any irregular transfer of the property consigned to them, or to deal with it in any way outside the usual course of business. An agent with power to ship and sell and receive the money from the purchaser, has no power to affect the property consigned to him for those purposes by tortiously selling it, or mortgaging or pledging it as a satisfaction or security for his own debt. The utmost that he could do, in that respect, would be to mortgage or pledge it to the extent of any lien which he might have upon it. (*Wright* v. *Solomon*, 19 Cal. 76; *Warner* v. *Martin*, 11 How. U. S. 209; subd. 2, § 2368, Civ. Code.)

But the shipment of the wheat by Morgan's Sons was not a pledge. They had no authority to pledge it. (Subd. 2, § 2368, *supra*.) But they had authority to ship in their own names, and sell at the port of delivery; and that included the power to deal with the wheat as their own in any contracts within the scope of their authority with the defendants, who had no knowledge that the plaintiff was the actual owner of it; and the actual owner was chargeable with knowledge that he had placed his property in the hands of his agents for the very purpose of enabling them to make such contracts as might be necessary and proper for transmitting it to Europe for sale on his account. He knew that, in execution of the agency, they had to make con-

tracts to which the law would attach a lien upon the property. When, therefore, the factors shipped the wheat in their own names, they were the only persons to whom the defendant could look, and with whom he dealt in receiving it. In the absence of knowledge that it belonged to the plaintiff, they, as shippers, were to him, in contemplation of law, the owners. From them and for them he received it as a common carrier for carriage, and the legal rights and duties of both parties became fixed by law the moment the wheat was placed on board of the ship. Having received it for the purpose of carriage, the defendant became bound to the shippers for the safe transportation and delivery of the wheat at the port of destination, and he was entitled to a lien on it for payment of his freight and charges on the completion of the voyage. (*Bulkley* v. *Naumkeag Steam Cotton Company*, 24 How. U. S. 391.)

This lien was created by law for the benefit of the carrier the moment that he received the goods for the purpose of carriage. "Such a lien," says Mr. Justice Clifford, "is regarded in the jurisprudence of the United States as a maritime lien, because it arises from the usage of commerce, independently of the agreement of the parties, and not from any statutory regulations. The legal effect of such a lien is, that the ship's owner, as carrier by water, may retain the goods until the freight is paid, or he may enforce the same by a proceeding *in rem* in the proper court." (*The Bird of Paradise*, 5 Wall. 555.)

The fact that the ship-owners had chartered the ship to Morgans' Sons for the voyage did not operate to deprive them of the benefit of the lien upon the cargo. Nor do the terms of the charter-party, or the circumstances of the shipment, show that the lien had been waived or extinguished. According to the charter-party, the owners had let only the carrying capacity of the ship, and not the ship itself. They retained the possession, command, and navigation of the ship, and the contract made between them and the shippers and charterers to carry the wheat on freight for the voyage for which the ship was chartered, is considered in law as a contract of affreightment. (*Marcardier* v. *Chesapeake Insurance Company*, 8 Cranch, 39.)

"In short, it appears to me," says Mr. Justice Story, "that, if the absolute owner does retain the possession, command, and control of the navigation of the ship during the voyage, and the

master is deemed his agent, acting under his instructions for the voyage, though authorized and required to fulfill the terms of the charter-party, the absolute owner must, under such circumstances, be still deemed owner for the voyage, and be liable as such to all persons who do not contract personally and exclusively with the charterer by a sub-contract with the latter, knowing his rights and character under the charter-party." (*Certain Logs*, 2 Sum. 596.) Such is the settled doctrine of American law upon the subject. (1 Johns. 229; 8 Wheat. 632; 3 Kent, 137–8.) Under the circumstances stated, the freighter is not clothed with the character or legal responsibility of ownership; nor was the ownership, in the case in hand, divested by the contract of affreightment made between the charterers and the defendant, consequently the wheat in the possession of the defendant was subject to the lien for the freight and proper charges which were due upon it.

This right of lien was inseparably associated with the possession of the wheat. So that, when the defendant rightfully obtained possession of it for the purpose of carriage, from those who had the authority to deal with it, he was entitled to retain possession until his duty in relation to it had been discharged, or, if from any cause the carriage was dispensed with, until his lien upon it had been extinguished by payment of the freight and charges or its equivalent.

And although the insolvency of Morgans' Sons, *before* the ship was laden and had "broken ground," but *after* the wheat had been placed on board, may have ended the transaction between them and the plaintiff as to the shipment and sale of the wheat, and dispensed with its carriage, yet the plaintiff was not entitled to the possession until he extinguished, or offered to extinguish, the lien which had attached to it. The defendant was not bound to reland it and deliver it to the plaintiff at the port of outfit, without tender or payment of the freight, or such other charges as were liens upon it. (Story on Bailment, § 585; *Campbell* v. *Connor*, 70 N. Y. 424; Hutchinson on Carriers, § 476, note; Abbott on Shipping, 595.)

Judgment reversed, and cause remanded to the Superior Court of Sacramento County for a new trial.

ROSS, J., and MCKINSTRY, J., concurred.

[No. 6,439.—Department No. 2.]

BOYD v. BRINCKIN.

CONTRACT — OFFER — ACCEPTANCE — SPECIFIC PERFORMANCE — TRUST.—The Central Pacific Railroad Company issued and distributed a circular, inviting people to settle and make improvements upon its lands, and promising those that should do so, that they should be preferred as purchasers, when the lands should be offered for sale. The defendant settled upon the land in controversy, and filed his application to purchase the same, in the office of the company, as directed by the circular, and made valuable improvements thereon. The company, without notifying the defendant that the price of the lands had been fixed, and without giving him the option to purchase, sold the land to the plaintiff, who took with notice of the defendant's equities. *Held*, in an action of ejectment, wherein the defendant filed a cross-complaint, setting up the above facts, and praying that the plaintiff be compelled to convey to him—that the offer of the company, and the acceptance by the defendant, created a valid contract, and that the plaintiff took the legal title impressed with a trust in favor of the defendant and should be compelled to convey the same to him.

APPEAL from a judgment for the plaintiff, in the Tenth District Court, County of Colusa. KEYSER, J.

A. L. Hart, for Appellant.

The facts set out in the answer show a contract between the defendant and the company, and a part performance by the defendant, which is sufficient to induce a Court of Equity to decree a specific performance. (*Peart* vs. *Gilmour*, Dec. term, 1877; 1 Story Eq. Jur. § 376 b.

W. F. Goad, and *W. C. Belcher*, for Respondent.

The facts stated in the special defense did not constitute a contract. The proposal of the company could become a contract, capable of specific performance, only when it had been accepted, without unreasonable delay, and in such unequivocal form as to bind the party accepting, and when the acceptance had been communicated to the company. (1 Pars. on Cont. 404; *Eliason* v. *Henshaw*, 4 Wheat. 225; *Tuttle* v. *Love*, 7 John. 470; *Davis* v. *Shields*, 26 Wend. 341; *Carr* v. *Duvall*, 14 Peters, 77; Fry on Spec. Per. § 166.) The defendant did not accept the proposal in such a manner as to bind him to buy the land on the terms proposed, or at all. (*Senter* v. *Davis*, 38 Cal. 450; *Grey* v. *Tubbs*, 43 id. 359; *Weber* v. *Marshall*, 19 id. 447;

Pearis v. *Covillaud*, 6 id. 617; Fry on Spec. Per. §§ 167–8.) The agreement as stated, lacks the requisite of mutuality. (*Hopper* v. *Hopper*, 1 Green C. E. 147; *Duvall* v. *Myers*, 2 Md. Ch. 401; *Bodine* v. *Glading*, 21 Penn. (9 Harris) 50; *Benedict* v. *Lynch*, 1 Johns. Ch. 370; *Marble Co.* v. *Ripley*, 10 Wall. 339; Fry on Spec. Per. § 286 and note.)

SHARPSTEIN, J.:

The complaint in this case is in the usual form of complaints in ejectment. The defendant answered, and by way of cross-complaint alleged that he was induced to settle upon the land sued for, by a circular issued and distributed by the Central Pacific Railroad Company, which invited people to settle and make improvements upon its lands, promising those who should do so, that they should be preferred as purchasers when the lands should be offered for sale. After settling upon the land, and before the same was offered for sale, defendant filed an application to purchase said land, in the office of the company, as he was directed to do by said circular. He alleges that he has made improvements on said land of the value of $2,500. The company in 1875 fixed the price of said land, and soon afterward sold and conveyed it to the plaintiff, who at the time knew that the defendant had settled upon and improved and was residing on said land, and also knew of the circular issued by said company, and of the application of defendant to purchase said land. The defendant did not know that the price of said land had been fixed, nor that plaintiff had purchased it, until the month of July, 1877. On or about the first day of January, 1878, the defendant tendered to plaintiff the sum which he paid for the land, and demanded a deed thereof from him. The plaintiff refused to accept the tender or to give a deed. Defendant avers his readiness to pay said sum, and brings it into court. Upon these and the usual formal allegations, he asks that the plaintiff be compelled to convey said premises to him, defendant.

To this cross-complaint the plaintiff demurred, on the ground that it did "not state facts sufficient to constitute a defense to said action, or a cause of action against the plaintiff." The demurrer was sustained, and a judgment entered in favor of plaintiff, from which the defendant appeals to this Court.

If the allegations of the cross-complaint are sufficient to entitle the defendant to a judgment for specific performance, it was error to sustain the demurrer. Those allegations, as we construe them, are to the effect that the railroad company, being the owner of the land described in the plaintiff's complaint, offered to any one who would settle upon and improve it, to sell it to such person as soon as the company should fix a price upon the same, at the price so fixed. The defendant accepted that offer, by settling upon and improving said land, and he notified the company of his acceptance by filing in its office an application to purchase, as soon as the price should be fixed. If we have here an offer on the one side, and an acceptance on the other, then we have a contract before us which a Court of Equity might decree a specific performance of.

In the brief of counsel for the plaintiff, the position is taken that "the alleged circular was not a contract, but simply an offer." We concur in that view of it; and we likewise concur in the following: "It was at most but a proposal, and could become a contract capable of specific enforcement only when it had been accepted, without unreasonable delay, and in such unequivocal form as to bind the party accepting, and when the acceptance had been communicated to the company."

This proposal was, that the defendant should settle upon and improve the land, and file an application to purchase it, and that as soon as the price of it was fixed, the company would sell it to him at that price. He accepted that offer, by doing all that he could do before the price was fixed. But the price could not be the subject of any future negotiations, because it was agreed that it should be fixed by the company.

We think that the contract in this case belongs to that group which is said to be "created by representations made by one party, and acts done by the other party upon the faith of such representations." (Pomeroy on Contracts, § 69.) "Where an absolute unconditional representation of something to be done in the future is made by one person, in order to accomplish a particular purpose, and the person to whom it is made, relying upon it, does the act by which the intended result is obtained, a contract is thereby concluded between the parties." (Id.)

The objection that the defendant, by his acceptance, did not

bind himself to buy the land upon the terms proposed by the company, does not seem to us to be tenable. His acceptance is evidenced by his settling upon and improving the land, and by filing an application to purchase it. Both by acts and in writing did he manifest such acceptance. If that did not bind him to purchase the land on the terms proposed by the company, we can conceive of no form of acceptance by which he could bind himself to purchase it on those terms.

The objection, that the defendant did not accept the offer of the company within a reasonable time, is based upon what we conceive to be a misconception of the character of the transaction. As we view it, the contract was complete as soon as the defendant settled upon the land and filed his application to purchase it. He was not, by the terms of the contract, to pay for it until the price was fixed by the company. As that was to be done by the company alone, it was the duty of the company to notify him of the fact that it had been done before he could be required to pay, or be held to be in default for not paying the price so fixed. This the company was bound to do by its proposal or representation, in which it is stated that "where two or more applications for the same land were filed, the rights of the several applicants to purchase said land should be adjudicated by the land agent of said company, upon due notice given by the said company to the said several applicants." This land was sold to the plaintiff, and the defendant alleges that he did not know of said sale, or that the plaintiff had applied to purchase it, or that a price had been fixed upon it, until two years after it had been actually conveyed to the plaintiff.

The defendant alleges, that the plaintiff, before and at the time of purchasing, had knowledge of the agreement between the defendant and the railroad company, and of all of the defendant's acts thereunder. If so, the plaintiff took the land impressed with the trust in favor of the defendant, and holds it in trust for the defendant, and can be compelled at the suit of the defendant to specifically perform the agreement of the railroad company, by conveying the land in the same manner and to the same extent as the railroad company would have been liable to do, had it not transferred the legal title, and the plaintiff is the proper party in the suit against whom to demand the conveyance. (Pomeroy on Contracts, § 455.)

In *Peart* v. *Gilmore*, No. 5,861, in this Court, although no opinion was filed, an inspection of the record satisfies us that all of the questions arising in this case are analogous to those that were before the Court, and must have been considered and passed upon by it in that case; and in affirming the judgment in that case, the Court must have held as we now hold.

Judgment reversed, with directions to the Superior Court to overrule the demurrer of the plaintiff to so much of defendant's answer as is demurred to by said plaintiff.

THORNTON, J., and MYRICK, J., concurred.

[No. 6,587.—Department No. 1.]

SIGOURNEY v. ZELLERBACH ET AL.

PLEADING—RELIEF.—It is a cardinal rule that the pleading of the party to whom relief is granted must be sufficient to warrant the relief.

ID.—ID.—INTERVENTION—MARSHALING SECURITIES.—ESCROW.—In an action to foreclose a mortgage, a complaint in intervention was filed, setting up a contract between the plaintiff and the defendant Z. (the mortgagor's grantee); whereby the former agreed to execute to the latter an assignment of the note and mortgage in suit, (and of another note and mortgage) and to place the same, with the instruments assigned, in escrow with one P.; Z., thereupon, to give his notes to the plaintiff for specified sums, and the assignment and instruments assigned to remain in the hands of P. as security for the payment of the notes, until Z. should deliver to him, as collateral security for the notes, certain shares of stock, and then to be delivered to Z.; the complaint in intervention further alleging full performance of the contract by Z., and the conveyance of the mortgaged premises by him, with warranty against incumbrances to the intervenor, and praying that the notes and mortgages be decreed to be delivered up and canceled, or, if the Court held the mortgage to be still in effect, that the stock delivered by Z. to P. should be first sold, and the proceeds applied on the mortgage. Z. answered the original complaint, setting up the same facts as the intervenor, but suffered default to the complaint in intervention. The Court found that such a contract had been made, and that Z. had made and delivered to the plaintiff his notes, and had delivered to P. certain shares of stock of the kind but not of the quantity required by the contract, and that the stock had not been accepted by the plaintiff in satisfaction of the contract, and decreed that the stock should first be sold and the proceeds applied on the mortgage, and that the mortgaged premises should be sold for the balance only. *Held*, that the allegations of the complaint were insufficient to sustain the judgment; and *held, further*, that (without re-reference to the sufficiency of the complaint) the plaintiff had no lien upon the stock, the same not having been accepted by him, and that, therefore, this was not a case for a marshaling of securities in favor of the intervenor.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Fourteenth District Court, County of Nevada. REARDON, J.

Johnson & Cross, *Irvine & Le Breton*, and *Garber & Thornton*, for Appellant.

The judgment must be warranted by the pleadings. Upon the plaintiff's pleadings, the only relief he could have was a foreclosure of the mortgage. The allegations of a cross-bill cannot be invoked to supply facts not averred in the complaint. (*Cross* v. *De Valle*, 1 Wall. 74; *Doyle* v. *Franklin*, 40 Cal. 106; *Mercier* v. *Lewis*, 39 id. 535; *Collins* v. *Bartlett*, 44 id. 372; Story Eq. Pl. § 878.) Upon the findings the result is the same. If the agreement set up in the cross-bill was never consummated, if essential conditions precedent were not performed, or if the agreement was rescinded, then the mortgage contract sued upon was unaffected, and it alone could be enforced. The agreement must stand or fall as an entirety, and cannot be affirmed and enforced in part, and ignored and rescinded in part. (*Miner* v. *Bradley*, 22 Pick. 457; *Voorhees* v. *Earl*, 2 Hill, 288; *Junkins* v. *Simpson*, 14 Me. 364; *Coolidge* v. *Brigham*, 1 Met. 550; *Jennings* v. *Gage*, 13 Ill. 610; *Perley* v. *Balch*, 23 Pick. 286; *Norton* v. *Young*, 3 Greenl. 30; *Cushman* v. *Marshall*, 21 Me. 122; *Sumner* v. *Parker*, 36 N. H. 449; *Bohall* v. *Diller*, 41 Cal. 532; *Purdy* v. *Bullard*, 41 id. 444; *Walf* v. *Dietzsch*, 75 Ill. 205.)

Geo. S. Hupp, and *A. B. Dibble*, for Plaintiff Respondent.

The appellant ignores the intervention; yet the intervention was served upon him, and his default entered. The facts alleged in the complaint of intervention entitled the intervenor to the relief granted.

Niles Searles, and *A. C. Niles*, for Intervenor Respondent.

When the intervenor became a party to the suit, it became an actor; and the Court, having jurisdiction of all parties and the entire subject-matter, could properly grant it any relief consist-

ent with its statement of facts, and within the purview of a Court of Equity. The relief granted to intervenor, by a sale of the stock deposited by Zellerbach, was not granted to plaintiff or for his benefit, but was so decreed because the admitted facts showed that Zellerbach had bound himself to satisfy the mortgage, had in part performed his agreement, and had become insolvent. The intervenor is in a position to invoke the recognized principle of equity, that a prior incumbrancer, holding a lien upon several parcels of property, may be required by a subsequent grantee to resort first to the parcels not covered by the subsequent conveyance. It does not lie in the mouth of the common grantor or mortgagor to object to this equitable marshaling of securities. (1 Story Eq. Jur. § 633, *et seq.*; 1 Hilliard on Mort. 221–242.)

C. W. Cross, *Garber*, *Thornton & Bishop*, and *Wm. Irvine*, for Appellant (in reply).

It seems to us self-evident that unless Sigourney acquired a lien on this stock, it could not be subjected to sale in this action. Whether the sale is ordered at the instance of Sigourney or the intervenor is immaterial. The latter can only claim derivatively through Sigourney, and by way of substitution to his lien.

Ross, J.:

July 2nd, 1859, the defendant, the Eureka Lake Company, a corporation, executed to the plaintiff its promissory note for the sum of ten thousand dollars, payable July 2nd, 1860, with interest thereon from date until paid, at the rate of two and one-half per cent. per month; and to secure its payment, at the same time executed to plaintiff a mortgage upon certain property of the corporation, described in the mortgage as follows:

"All and singular those certain water ditches, flumes, and aqueducts, and the water rights, privileges, easements, and franchises of the Eureka Lake Company, situate, lying, and being in the County of Nevada, State of California, owned and possessed, constructed and constructing by the Eureka Lake Company aforesaid, including therein the waters of Cañon Creek and its tributaries, the French Lakes, ravines, gulches,

and creeks on the line of said ditch, extending from Cañon Creek to Bloomfield, (formerly Humbug City) and for supplying Eureka, Mount Zion, Relief Hill, Bloomfield, and adjacent towns, with water for mining and other purposes, together with all and singular the ditches, flumes, canals, reservoirs, water rights, ways and rights of way, tenements, hereditaments, and appurtenances in any way appertaining thereto, with the rents, issues, and profits thereof."

July 1st, 1864, the plaintiff commenced this action to foreclose the mortgage, the complaint being in the usual form of such actions.

One Zellerbach, among others, was made a party defendant. All of the defendants except Zellerbach suffered default. Service of process was made on him October 26th, 1877, more than thirteen years after the filing of the complaint.

Intermediate the execution of the mortgage of July 2nd, 1859, and the commencement of this action, the Eureka Lake Company consolidated its water rights, ditches, etc., with like properties of the Miners' Ditch, another corporation, and organized a new one under the name of the Eureka Lake Water Company. This new corporation borrowed of the plaintiff, about the 9th of November, 1861, the sum of twelve thousand dollars, and of one Marcellus the sum of twenty-eight thousand dollars; and executed to the plaintiff and Marcellus its two several promissory notes therefor, to secure the payment of which it also executed to plaintiff and Marcellus a mortgage on its property. The Eureka Lake Water Company also became largely indebted to the defendant Zellerbach, and other persons, and for the purpose of paying and discharging such debts, it duly assigned and transferred to Zellerbach, subject to the liens of the plaintiff, (Zellerbach having become the owner of the twenty-eight thousand dollar note) all of its water rights, ditches, and property.

In this condition of affairs, Zellerbach, who, in addition to the property above mentioned, was the owner and possessor of certain other water rights and ditches, became desirous of organizing a corporation in the State of New York, to which he might sell all of the said property. To accomplish his purpose it became necessary to free the property of all liens. With that end in view, he, (Zel-

lerbach) on the 23rd day of August, 1865, entered into and executed with the plaintiff, Sigourney, a contract in writing, by which the respective parties covenanted with each other as follows: Sigourney agreed that he would forthwith execute to Zellerbach assignments of the note and mortgage made to him by the Eureka Lake Company on the 2nd of July, 1859, and of the twelve thousand dollar note made to him by the Eureka Lake Water Company on the 9th of November, 1861, together with his (Sigourney's) interest in the mortgage given by the Eureka Lake Water Company to secure the payment of the note last mentioned and the twenty-eight thousand dollar note given to Marcellus; and further, that he (Sigourney) would, immediately upon executing the assignments, place the same, together with the said notes and mortgages, in the hands of John Parrott of San Francisco, to be by him held in escrow, and delivered to Zellerbach upon the performance of the following conditions on the part of Zellerbach, which the latter agreed to perform: that is to say, Zellerbach agreed that immediately upon the execution of the aforesaid assignments by Sigourney, and the deposit thereof, together with the said notes and mortgages, in the hands of Parrott, as already mentioned, he (Zellerbach) would execute to Sigourney his promissory note for the sum of forty thousand dollars, payable in gold coin nine months after its date, with interest thereon at the rate of one-half of one per cent. per month until the maturity thereof; and if not paid at maturity, the said note to bear interest at the rate of one and one-quarter per cent. per month until paid; and also that he (Zellerbach) would at the same time execute to Sigourney his other promissory note for the sum of ten thousand dollars, payable in gold coin nine months after its date, with interest thereon at the rate of one and one-quarter per cent. per month; and further, that he (Zellerbach) would pay or cause to be paid the interest on said forty thousand dollar note monthly, and on said last mentioned ten thousand dollar note at the end of every three months. It was further mutually agreed between the respective parties, that in the event Zellerbach should, at any time before the maturity of the last mentioned ten thousand dollar note, become desirous of paying the same, he might do so upon giving Sigourney thirty days' previous notice in writing of

such desire. The agreement then recites that "whereas, it is the intention of said party of the second part (Zellerbach) to forthwith proceed to organize a corporation for the purpose of carrying on and conducting the works in Nevada and Sierra Counties, California, heretofore owned and conducted by the said Eureka Lake Water Company * * * and by the Middle Yuba Canal and Water Company, now this agreement further witnesseth, and it is hereby mutually agreed and declared by and between the said parties," in substance, that the assignments, notes, and mortgages deposited in escrow with Parrott should remain in his hands as security for the payment of the forty thousand dollar note, and the last mentioned ten thousand dollar note, until said notes should be paid or other security given as next mentioned; that is to say, if Zellerbach should deposit with Parrott unincumbered and unassessable stock of the corporation he contemplated organizing, "to the amount of one-sixteenth part or share of the whole capital stock, as collateral security for the payment of said forty thousand dollar note, and the further amount of one sixty-fourth part or share of said stock, likewise unincumbered and unassessable, as collateral security for the payment of said ten thousand dollar note, then and in such case it shall be lawful and it is hereby made the duty of said Parrott to receive such stocks as such collateral security, and immediately thereupon to deliver" to Zellerbach the assignments, notes, and mortgages so deposited with him in escrow: "provided always, and it is hereby made the duty of said Parrott, before receiving such stock as security, and delivering such papers so deposited with him as aforesaid, to be fully satisfied that the titles of all property formerly belonging to the Middle Yuba Canal and Water Company and the Eureka Lake Water Company are conveyed to, and the same fully and completely vested in, the new company so to be formed as aforesaid, free and clear from incumbrances other than liens, mortgages, or incumbrances held or controlled by said company, or by parties in trust for it, or held in escrow for its benefit."

Provision is then made in the contract for the disposition of the stock in the event of the payment of the forty and ten thousand dollar notes, and also for its disposition in the event of their non-payment.

The provisions of the contract between Sigourney and Zellerbach have been thus fully stated, because necessary to a correct understanding of the case.

The Eureka Lake and Yuba Canal Company Consolidated was subsequently incorporated under the laws of the State of New York, and, after obtaining leave of the Court, filed in this action, on the 29th of April, 1878, its complaint in intervention, wherein it is alleged that in the year 1865 Zellerbach had succeeded to and was the owner of the property described in the plaintiff's mortgage, and being desirous of selling it, together with other and similar property in the vicinity thereof by him either owned or controlled, and the intervenor being desirous of purchasing all of the said property, provided the liens could be removed, he, Zellerbach, for the purpose of discharging the liens, entered into the aforesaid contract with Sigourney, and that in pursuance of its terms, Sigourney executed an assignment of the notes and mortgages, as provided for in said contract, and did deposit the same, together with the assignments thereof, in the hands of John Parrott; that upon the making of the said deposit, Zellerbach executed to Sigourney his two promissory notes for forty thousand dollars and ten thousand dollars respectively, as provided for in the aforesaid contract of August 23rd, 1865, which were accepted by Sigourney, and have been ever since held by him, and upon which Zellerbach has up to and including February 1st, 1877, paid the interest as provided in said contract of August 23rd, 1865; that in further compliance with the said last mentioned contract, Zellerbach deposited with Parrott one-sixteenth of all the capital stock of the Eureka Lake and Yuba Canal Company Consolidated, unincumbered and unassessable, as collateral security for the payment of the forty thousand dollar note, and one sixty-fourth of all of said capital stock, likewise unincumbered and unassessable, as collateral security for the payment of the ten thousand dollar note, as in the said contract provided; that Zellerbach, in brief, kept and performed all the agreements, covenants and conditions on his part provided to be kept and performed in and by the contract of August 23rd, 1865; that Parrott, before receiving the stock as security, became and was satisfied, and so reported to the intervenor and to the plaintiff, that the property in the

agreement mentioned was free and clear of incumbrances and liens, except such "as were held by the intervenor, or by parties in trust for it, or in escrow for its benefit." The complaint in intervention further charges that Zellerbach represented to the intervenor that the incumbrances in the agreement of August 23rd, 1865, provided for, were deposited for him, to be delivered up and canceled upon the conveyance to intervenor of the property of the Eureka Lake Company, the Eureka Lake Water Company, the Middle Yuba Canal Company, and certain other property, and upon the issuing and deposit with Parrott of the stock as aforesaid for Sigourney; that relying upon such statements, and believing them to be true, the intervenor was induced thereby to purchase, and did, on, to wit, December 20th, 1865, purchase from Zellerbach, and take from him, a deed conveying to it in fee simple, all and singular the property in the contract of August 23rd, 1865, mentioned, including all of the property embraced in the mortgage described in the complaint; that by said deed of conveyance Zellerbach warranted and bound himself to defend the title to the property conveyed as against all liens, incumbrances, and adverse claims, and covenanted to and with the intervenor that all of the said property was free and clear from liens and incumbrances of every kind; that the conveyance to the intervenor was duly recorded, of all of which Parrott and Sigourney had notice, and that thereupon the stock was issued and deposited with Parrott for plaintiff, as before stated; that Zellerbach has become insolvent, and is unable to respond to intervenor in damages if the mortgage referred to in the complaint is foreclosed, and the property therein described sold. The prayer of the complaint in intervention is, first, that the note and mortgage described in the complaint be decreed to be delivered up to the intervenor and canceled; second, that if the Court find that the said note and mortgage were not duly assigned to Zellerbach, and that he is in equity bound to satisfy the same, that it will adjudge the interest on the note to have been paid to January, 1877, and as against the intervenor decree the two thousand shares of the capital stock of the Eureka Lake and Yuba Canal Company Consolidated, deposited as collateral security with Parrott, to be first sold to satisfy the amount due plaintiff, if any; and third, for general relief.

Zellerbach admitted the averments of the complaint in intervention, by failing to respond to them. The plaintiff answered, denying, among other things, the performance on the part of Zellerbach of the covenants and conditions of the contract of August 23rd, 1865. There were also other pleadings in the case—not, however, material to be mentioned. At the trial evidence was given, to which no objection seems to have been made, upon which the Court below found that, at the time of the making of the agreement between the plaintiff and Zellerbach in August, 1865, an "accounting and settlement were had between them, and upon such accounting it was ascertained and agreed (after deducting all credits, cash then paid, the interest from 2nd of July, 1865, to 19th of August, 1865, the difference in value between gold coin and legal tender notes of the United States) that the twelve thousand dollar note given by the Eureka Lake Water Company was fully paid, and there remained a balance due to the plaintiff on the promissory note in suit, the sum of fifty thousand dollars gold coin. The difference between the value of gold coin and said legal tender notes, together with said interest, deducted as above stated, was about $15,500, which sum the said defendant Zellerbach then and there verbally agreed to pay to the plaintiff."

The Court also found, among other things, that about the month of February, 1866, Zellerbach deposited with Parrott one thousand two hundred and fifty shares, being one-sixteenth of the capital stock of the corporation provided for in the contract of August 23d, 1865, to wit, the Eureka Lake and Yuba Canal Company Consolidated, in partial compliance with the said agreement; and further, that he never deposited with Parrott any other or greater number of shares of said stock in performance of the said agreement, or on account thereof, but that he did place in the hands of the said Parrott, for the said plaintiff, about September, 1867, seven hundred and fifty other shares of said stock as collateral security for the payment of the said sum of $15,500; that "the said Parrott has never delivered to the plaintiff the said one thousand two hundred and fifty shares of stock, nor any part thereof; nor has he delivered to the said defendant the two notes and mortgages described in said agreement, and deposited with him in escrow, nor either of them, nor

the said assignments thereof, placed with him likewise in escrow, nor either of them, but he still has each and every of said papers in his possession, and the contingency upon which the assignment of the note and mortgage in suit, executed by plaintiff and deposited with Parrott, was to be delivered to the said defendant, and take effect as a transfer, has never happened. The said plaintiff never accepted the one thousand two hundred and fifty shares, nor the seven hundred and fifty shares, nor both together, as security, nor as a compliance with the agreement aforesaid."

The Court below gave judgment for the plaintiff for the sum of $63,077.71, being the amount by it found to be due on the note mentioned in the complaint, including costs, and further adjudged and decreed that the one thousand two hundred and fifty shares of the stock of the Eureka Lake and Yuba Company Consolidated, in the hands of Parrott, be delivered to the Sheriff of Nevada County, and by that officer sold, and the proceeds of such sale applied to the payment of the costs of this action and the amount of the plaintiff's judgment, and that the excess, if any, be paid to Zellerbach; and, further, that in the event the proceeds of the sale of the said one thousand two hundred and fifty shares be insufficient to pay the costs of this action and the amount of the plaintiff's judgment, then the whole of the property described in the mortgage mentioned in the complaint, or so much thereof as may be necessary, be sold by the Sheriff, and the proceeds applied to the payment of the residue of said judgment and costs.

We are unable to discover any ground upon which the decree can be sustained. It is a cardinal rule that the pleadings of the party to whom relief is awarded must be sufficient to warrant the relief. (Story Eq. Plead. § 878; *Mondran* v. *Goux*, 51 Cal. 151; *Mercier* v. *Lewis*, 39 id. 535; *Collins* v. *Bartlett*, 44 id. 372; *Johnson* v. *Moss*, 45 id. 517; *Christian College* v. *Hendly*, 49 id. 350; *Hayward* v. *National Bank*, 6 Otto, 615; *Bradley* v. *Aldrich*, 40 N. Y. 504.) In this case the plaintiff's complaint makes no reference whatever to the shares of stock of the Eureka Lake and Yuba Canal Company Consolidated. Nor was there any reason why it should. The plaintiff certainly had no lien upon the one thousand two hundred and fifty

shares of the stock as security for the payment of the note in suit. If he had any lien on the stock at all, it was as security for the payment of the *forty thousand dollar* note; but according to the findings of the Court below, he had no lien on it for any purpose, for reasons presently to be stated.

In the absence of a lien to secure the payment of the note sued on, it is obvious that the plaintiff was not entitled to a decree directing the sale of the stock and the application of the proceeds to its payment.

It is said, however, that the decree, in so far as it directs the sale of the stock, was not made for the benefit of the plaintiff, but that it was "so decreed because the admitted facts showed that Zellerbach had bound himself to satisfy the mortgage, had in part kept his agreement, and had become insolvent."

We cannot see how the fact that Zellerbach had bound himself with the intervenor to satisfy the plaintiff's mortgage, and had in part kept his agreement, and become insolvent, could operate to *create a lien* in favor of the plaintiff, or of the intervenor, on the one thousand two hundred and fifty shares of stock, to secure the payment of the note described in the complaint.

This is not the case where one party has a lien on, or interest in, two funds or two pieces of property for a debt, and another party has a lien on, or an interest in, one only of the funds or pieces of property, and seeks, in equity, to compel the former to resort to the other fund or piece of property, in the first instance, for satisfaction; but here, on the contrary, and as already observed, the plaintiff *never had any lien* on the stock to secure the debt sought to be recovered by his action. Under such circumstances, we know of no principle which would authorize a decree directing the sale of the stock for the payment of the debt, whether it be made for the benefit of the plaintiff, or the subsequent purchaser of the property which *was* mortgaged to secure its payment.

There is another reason for the same conclusion, even if it be conceded that resort can be had in support of the decree to the complaint in intervention. That pleading, as we have seen, alleges, among other things, full compliance on the part of Zellerbach with all the agreements, covenants, and conditions of his

contract with Sigourney, of date August 23d, 1865. If its averments are true, it would follow, of course, that Zellerbach was entitled to the surrender of the note and mortgage mentioned in the complaint, as also the notes and mortgage made to him and Marcellus by the Eureka Lake Water Company, for cancellation; and the plaintiff would not be entitled to any relief in this action. It would seem plain, therefore, that if the complaint in intervention be looked to in support of the decree, so far from supporting it, the allegations there found would show, if established, that the plaintiff was not entitled to recover anything.

The Court below, however, contrary to the allegations of the intervenor, found as a fact that none of the stock was ever accepted by plaintiff as security or as a compliance with the contract of August 23d, 1865; that it was deposited only in escrow, and that the contingency upon which the transfer was to take effect has never happened. According to these findings, no lien could have arisen in plaintiff's favor upon such deposit: first, because none of the stock was ever accepted by the plaintiff as security; and, secondly, because it was deposited in escrow, and the conditions upon which it was to be delivered never happened. The delivery, therefore, never became absolute, and the stock continued as unaffected by any lien as though it had remained in Zellerbach's pocket.

Judgment and order reversed, and cause remanded to the Court below for a new trial, as of date May 20th, 1880.

McKINSTRY, J., and McKEE, J., concurred.

[No. 7,039.—Department No. 2.]

SOWDEN v. IDAHO QUARTZ MINING COMPANY.

ATTORNEY OF RECORD — ASSOCIATE COUNSEL — SERVICE.—The complaint was signed, "G. D. B., plaintiff's attorney." On the trial G. D. B. and H. V. R. appeared as counsel for the plaintiff. Service of motion for a new trial was accepted by "H. V. R., one of the attorneys for the plaintiff." Service of notice of appeal was admitted by "G. D. B. and H. V. R., plaintiff's attorneys." Service of the transcript was admitted by "G. D. B. and H. V. R., attorneys for plaintiff and respondent." Transcript was indorsed "G. D. B., Esq., and H. V. R., Esq., attorneys for respondent," and briefs filed with similar indorsements. Then G. D. B. files a separate brief, making the point that the notice of motion for new trial had not been served upon himself as attorney of record. *Held*, that the objection came too late.

MASTER—SERVANT.—In an action by an employé for injury incurred in the course of the employment, the Court, at the request of the plaintiff, instructed the jury that "The servant assumes no risks, except such as existed at the beginning of the employment, and such as are incidental to the business." *Held*, that the Court should have added words equivalent to, "or which existed during the course of the employment, of which the employé had knowledge or was bound to have knowledge."

ID.—ID.—DAMAGES — NEGLIGENCE — INSTRUCTION. — Certain instructions defining the liability of master to servant for injury incurred in course of employment *approved*. (The instructions will be found in statement of the case.)

EVIDENCE — REPUTATION — NEGLIGENCE. — The issue being, was E. powder a reasonably safe powder, and did the defendant exercise due care in ascertaining its safety? a witness was asked,—the defendant objecting—"What was the reputation of E. powder as a safe or dangerous compound?" *Held*, error; it not appearing that the reputation asked for ever came to the knowledge of defendant, or that it existed at any place where defendant was bound to inquire.

ID.—EXPERT—WITNESS.—A practical miner who has used blasting powder for years, and used a large amount of a certain powder, can be asked his opinion, based upon his experience, as to the safety of that powder, by virtue of the provisions of subdivision 9, § 1870, of the Code of Civil Procedure.

APPEAL by defendant from judgment in favor of plaintiff, and from order denying motion for new trial, in the District Court of the Fourteenth Judicial District, County of Nevada. REARDON, J.

The facts are stated in the opinion of the Court.

The instructions approved by the Court in its opinion, but not set forth, were as follows, to wit:

"*First.*—As between master and servant, the latter took upon himself all the dangers and risks incident to the employment in

which he engages; and, for injuries received in the course of his employment, and naturally resulting therefrom, the master is not liable. Neither is the master liable for injuries to the servant from causes purely accidental.

"*Second.*—The burden of proving negligence on the part of the company in this case devolves upon the plaintiff, and if he has failed to establish such negligence, the verdict should be for the defendant.

"*Third.*—There is nothing legally wrong in the use by an employer, of a powder less safe to his workmen than some other powder that might be selected, and even though the workman sustain an injury by the use of such powder, he has yet no right of action for such injury, where he knew, or had the means of readily ascertaining, as well as the employer himself, all the facts in relation to the character of the powder and the manner in which it ought to be used.

"*Fifth.*—If the jury believe, from the evidence, that the defendant used ordinary care and prudence to avoid exposing its workmen to dangers arising from the use of the Excelsior powder; and that prior to the time the plaintiff was injured, the powder had been so tested by a great number of experiments by practical miners, as to justify a man of ordinary care and prudence in allowing it to be used by his workmen, and the defendant knew of such tests and experiments, then the plaintiff is not entitled to recover in this action.

"*Seventh.*—If the jury find, from all the evidence in the case, that an iron bar was reasonably safe for the purpose of tamping the powder in question, and that the defendant, in the exercise of ordinary care and prudence, had a right to believe, and did believe, that it was reasonably safe for such purposes, then the plaintiff is not entitled to recover because an iron bar was used.

"*Eighth.*—The implied contract to furnish safe material and implements for working its mine, is the foundation of defenddants' liability in a case of this character. If the workman, being fully able of choosing and contracting for himself, and with a knowledge, or with ready means of acquiring a knowledge, of the risk which he assumes, chooses to undertake a hazardous employment, or to put himself into a hazardous position, no such implied contract arises."

And the Court refused to give the following instructions asked for by the defendant:

"*Fourth.*—The workman is not bound to risk his safety in the service of his employer, and may, at his own option, decline any service in which he has reason to apprehend injury to himself, and if the plaintiff in this case used the powder in question, or any other powder known to be a dangerous explosive, he then assumed all risks incident to such use.

"*Sixth.*—If, from all the tests and experiments which the jury may find from the evidence to have been made with this powder before the plaintiff was injured, a man of ordinary care and prudence would have been justified in permitting it to be used by his workmen, for the purpose of blasting in his mine, and the defendant knew of such tests and experiments, and of the result thereof, then the plaintiff is not entitled to recover in this action."

And the Court then gave in writing the following instructions, upon the request of the plaintiff:

"*First.*—That it is the duty of the master to exercise care and prudence, that those in his employment be not exposed to unreasonable risks and dangers, and that the servant has a right to understand that the master will exercise that diligence in protecting him from injury; and also, in selecting the agent from which it may arise.

"*Second.*—That the plaintiff is only bound to use ordinary care in the performance of his work, and that if in the use of such care an accident happens to him, caused by the negligence of the defendant or its agents, then the defendant is liable in damages for the injury received.

"*Third.*—That if the jury believe, from the evidence, that the foreman of the defendant disregarded the instructions of the inventor of the powder, and instructed the plaintiff to use the same in a dangerous and unsafe manner, or with dangerous and unsafe implements, and that the plaintiff was ignorant of the proper manner of using this powder, and relying upon and following such instructions and directions of such foreman, with all the usual and ordinary care and skill, he was injured in the manner complained of, he is entitled to recover in this action.

"*Fourth.*—That the defendant was bound to furnish proper

and safe instruments for the use of its employés in working the Excelsior powder. Therefore, if you believe from the evidence that an iron tamping-bar was an unsafe instrument to use on the powder, or if you believe that a wooden bar would have been safer, then it was negligence on the part of the defendant to furnish iron tamping-bars to its employés, provided the defendant knew, or by the use of ordinary care and diligence could have ascertained, that such iron bar was unsafe, or that a wooden bar would have been safer, and the plaintiff was ignorant thereof.

"*Fifth.*—That if you believe, from the evidence, that the powder, aside from the implements used upon it, was unsafe and dangerous in itself, when handled and employed in the same way as black powder, and that the defendant either knew or could have known that fact by the exercise of reasonable care and diligence, then you must find for the plaintiff, provided you further believe, from the evidence, that the plaintiff was ignorant of that fact.

"*Seventh.*—That if there is a proximate and discoverable cause which may have produced the injury, and which the evidence will warrant you in finding was sufficient for that end, then the mere fact that another cause existed which was adequate to the production of the same result, will not necessarily relieve the defendant.

"*Eighth.*—That when one enters into the service of another, he assumes the probable risks incident to the service, but the risk which the servant assumes must be measured by the master's duty, and is qualified by it.

"*Ninth.*—That there is another qualification or exception to the risk which the servant assumes, and that is, he assumes no risk except such as existed at the beginning of the employment, and such as are incident to the business.

"*Tenth.*—In order to imply assent to the hazards and risks, they must be patent, and such as the servant knows of or ought to know of.

"*Twelfth.*—That the defendant cannot relieve itself from responsibility on account of the carelessness or negligence of a third party; therefore, if you believe that Joseph Thomas was careless or negligent in the use of the powder, and that the de-

fendant, relying on his statement, used the powder in a careless or negligent manner, it is evidence of negligence.

"*Thirteenth.*—The employer must in all cases indemnify his employé for losses caused by the employer's want of ordinary care, and if the plaintiff necessarily suffered loss and injury in direct consequence of his obedience to the directions of his employer, he is entitled to recover in this action.

"*Fourteenth.*—That if you believe, from the evidence, that the negligent act complained of was committed before the defendant had properly and carefully performed its duty, you must find for the plaintiff, unless you are satisfied that the Excelsior powder, in comparison with black powder, is safe when submitted to the same tests as black powder.

"*Fifteenth.*—That 'ordinary care' is dependent in a great measure upon the circumstances of each particular case, and that in the use of combustible or explosive materials, great care is required.

"*Eighteenth.*—In estimating damages, the jury should take into consideration the bodily suffering of the plaintiff, his pain of mind, and his business, and all expenses, if any, incurred on account of injuries received, and the employment of physicians and nurses, medicine and board, and also whether the injuries are likely to be permanent or only temporary.

"*Nineteenth.*—That if you should find for the plaintiff, he is entitled to recover not only the amount of damages which he suffered prior to the commencement of the action, but also all the damages proceeding continuously from the injury complained of, which he has suffered up to the verdict, and which it is reasonably certain that he will suffer in the future. In other words, if the plaintiff is entitled to recover in this action, you should allow him such damages as in your opinion will fully compensate him for the loss and injury he has sustained.

"*Twentieth.*—You are instructed that the defendant in this action cannot avail itself of the experiments performed by the Excelsior Powder Company, or of the Providence Mining Company, prior to the introduction by the defendant of Excelsior powder into its mine, as evidence of care on its part, unless you believe, from the evidence, that the defendant knew of these experiments at that time."

Thereafter, the Court, of its own motion, gave to the jury, in writing, the following instructions, to wit:

"In this case, as it appears to me, one of the most material questions grows out of the point made by the plaintiff, at the trial, that the defendant introduced into its mine a new powder, known to it to be highly dangerous and unsafe when used for blasting purposes in the same manner as black powder, without disclosing that fact to the plaintiff; but, on the contrary, directed him to use it, and tamp in every respect as he had been accustomed to use and tamp black powder; whereby, though he followed such direction with great care, prudence, and skill, a premature explosion occurred, by reason of his tamping it with an iron bar, as miners were accustomed to tamp black powder, and he was thereby injured.

"Upon this point, I charge you that if the foreman, under whom the plaintiff was working, and from whom he took his orders, was charged with the duty, and had the power to employ and discharge the men, and knew, or had reason to believe, the Excelsior powder could not with safety be tamped with an iron tamping-bar, and without informing the plaintiff thereof, or imparting to him the knowledge he possessed, directed him to use it, and treat it in the same manner as he had been accustomed to treat black powder, including the use of the iron bar; and if the plaintiff followed such directions with ordinary care, prudence, and skill, and a premature explosion occurred by reason of the use of the iron tamping-bar, then the defendant is liable for the injuries the plaintiff thereby sustained, provided said plaintiff was, at the time, ignorant upon the subject.

"It is true that the plaintiff, when he contracted with the defendant to work in its mine, took upon himself all the risks necessarily and usually incident to such employment, but if the defendant had knowledge or information showing that the particular powder was dangerous or unsafe to a degree beyond that which plaintiff could fairly be supposed to know, or anticipate, it was bound to impart to him such information as that he might then have the opportunity of deciding for himself whether or not he would assume the extra risk and danger."

Dibble & Kitts, and *Geo. S. Hupp*, for Appellant.

The defendant being at the time of the accident in the law-

ful pursuit of its legitimate business, the injury of plaintiff is *damnum absque injuria*, unless upon proof of negligence on the part of defendant or its agents. (*Rood* v. *N. Y. & E. R. Co.* 18 Barb. 85.) Negligence defined (*Nitro Glycerine Case*, 15 Wall. 536); and the burden is on plaintiff to prove it. (Id. 537.)

As to degree of care required of defendant (*Hoffman* v. *Tuolumne W. Co.* 10 Cal. 413; *Todd* v. *Cochell*, 17 id. 98. Civ. Code, §§ 1970, 1971.)

The servant is himself bound to exercise proper care. (Wood's Master and Servant, 558; *Hayden* v. *Smithville*, 29 Conn. 558.) The plaintiff was aware of the particular risk, and accepted it, and cannot complain. (*Sullivan* v. *India M. Co.* 113 Mass. 398–9; *Coombs* v. *N. Bedf. C. Co.* 102 id. 572; *Smith* v. *First Nat. Bank*, 99 id. 605; *Priestley* v. *Fowler*, 3 Mees. & W. 1–7; Wharton on Neg. §§ 200, 214; *Owen* v. *N. Y. C. R. R. Co.* 1 Lans. 110; *Faulkner* v. *Erie R. E.* 49 Barb. 324; *Sherman* v. *R. & S. R. R. Co.* 17 N. Y. 156–7; *McGlynn* v. *Brodie*, 31 Cal. 376; *Farwell* v. *B. & W. R. R. Co.* 4 Met. 57.)

The evidence is insufficient to justify the verdict, and a new trial should have been granted. (*Bagley* v. *Eaton*, 8 Cal. 164; *Potter* v. *Carney*, 8 id. 574; *Minturn* v. *Burr*, 20 id. 48; *Lyle* v. *Rollins*, 25 id. 437; *Iburg* v. *Suanet*, 47 id. 265.)

The preponderance of the evidence is so great as to show injustice, and the verdict should be set aside. (*Townsend M. Co.* v. *Foster*, 51 Barb. 346; *Adsit* v. *Wilson*, 7 How. Pr. 66; *Conrad* v. *Williams*, 6 Hill, 444; *Jackson* v. *Sternbergh*, 1 Caines, 162.

H. V. Reardon, for Respondent.

The defendant was guilty of negligence in furnishing the plaintiff a dangerous compound to work with, and dangerous implements with which to use it.

There is no material issue entirely unsupported by evidence, and the verdict will not be disturbed. (*Algier* v. *Steamer Maria*, 14 Cal. 167; *Brown* v. *Smith*, 10 id. 511.) The negligence of the master's agents is his own. (*Flike* v. *Boston A. R. Co.* 53

N. Y. 553, and numerous other cases cited.) Counsel here cites very numerous authorities to support the instructions.

MYRICK, J.:

This action was brought to recover damages for personal injuries to plaintiff, caused by the premature explosion of blasting powder, known as Excelsior powder, manufactured by one Haffenager. Under the pleadings in this case the substantial issues were:

1. As to the safety of the Excelsior powder as a blasting powder.

2. As to whether the defendant exercised due care in supplying a reasonably safe powder, and in permitting the Excelsior powder to be used by its workmen.

3. Whether the plaintiff knew or ought to have known of the qualities of the powder, and whether he exercised due care in its use.

4. Whether the defendant provided proper appliances for the use of the powder.

The Court fully and clearly instructed the jury as to the relations existing between plaintiff and defendant as master and employé, the obligations resting upon each toward the other, and as to the care proper to be exercised by each.

Upon the trial, plaintiff asked the witness Price whether Haffenager was a skillful chemist or scientist. Plaintiff also asked the witness Drisco as to the reputation of Haffenager as a scientist or chemist. Notwithstanding defendant's objection, the Court permitted the questions to be asked. There was no error in these rulings, as the defendant had by its answer tendered the issue "that said Haffenager was reputed to be and was an accomplished chemist and scientist." Plaintiff asked the question, "What was the reputation of Haffenager's powder as a safe or dangerous blasting compound?" The witness to whom this question was put, was a quarryman at the Oakland quarry. It does not appear that the reputation referred to by the inquiries to him ever came to the knowledge of defendant or its officers or agents; nor that it existed in any place where it would be the duty of defendant to have made inquiries; nor

did plaintiff offer to place that reputation in any locality; the witness may have known the reputation of the powder at Oakland, or in some foreign country. The *reputation* of the powder was not directly in issue. *Its safety* was the point in issue. Its reputation was material only in the light of showing whether defendant used proper care in ascertaining its safety. The admission of the answer to this question was error.

The defendant's witness, Polglase, testified that he was a practical miner, not a scientist or chemist; did not know what ingredients composed the Excelsior, black, or Giant powder; had used blasting powders twenty-two years; had used about six hundred pounds of Excelsior powder in six hundred to a thousand blasts in the defendant's mine before the injury to plaintiff, and that no injury of any kind had occurred. He was then asked by defendant, "In the light of your experience, what do you say as to the safety of the Excelsior powder for blasting purposes?" Plaintiff's objection to this question was sustained. Under § 1870, subd. 9, Code of Civil Procedure, defendant was entitled to the opinion of the witness, otherwise no miner, nor any person not a professional scientist or chemist, no matter what experience he may have had, can give his opinion. Usually, the question whether a person be an expert is for the trial court to determine definitely, and the ruling will not be reviewed; but in this case we think the defendant was entitled to the opinion of the witness, based as it was upon his own experience. (*Estate of Toomes*, 54 Cal. 509, and authorities there cited; *Blood* v. *Light*, 31 Cal. 115.)

We think that all the instructions given, and all the rulings upon instructions, were correct, with one exception, viz:

"*Ninth.*—That there is another qualification or exception to the risk which the servant assumes, and that is, he assumes no risk, except such as existed at the beginning of the employment, and such as are incident to the business."

This instruction was given at the request of plaintiff. As we understand the instruction, it is, that the employé assumes such risks, and such risks only, (not incident to the business) as existed at the beginning of the employment; and if there be a risk which did not exist until after the beginning of the employment, but commenced to exist during the course of the employ-

ment, the employé had no risk regarding the same. We do not think that this instruction states the correct rule. It should have added to it words equivalent to these: "or which existed during the course of the employment, of which the employé had knowledge or was bound to have knowledge." If an appliance be introduced after the commencement of the employment, from the use of which follows a risk which the employé knows or ought to know—that is, if the risk or danger be known to him or be patent and obvious—he assumes the risk by continuing in the employment.

G. D. Buckley, Esq., attorney for respondent, makes the point, "There can be no valid appeal from the decision of the Court denying the defendant's motion for a new trial, for the reason that no notice of motion to that effect was served upon the plaintiff's attorney of record." The history of the case relating to attorneys for plaintiff is as follows: The complaint is signed "G. D. Buckley, plaintiff's attorney." The order of court, rendering judgment, recites that the cause came on for trial; "the said parties appeared by their attorneys; G. D. Buckley and H. V. Reardan appeared as counsel for the plaintiff," etc. Service of defendant's motion for a new trial was accepted by "H. V. Reardan, one of the attorneys for plaintiff." Service of the notice of appeal was admitted by "G. D. Buckley and H. V. Reardan, plaintiff's attorneys." Service of the transcript was admitted by "G. D. Buckley and H. V. Reardan, attorneys for plaintiff and respondent." The transcript is indorsed, "G. D. Buckley, Esq., H. V. Reardan, Esq., attorneys for respondent." Three briefs have been filed on behalf of respondent, one signed "Buckley & Reardan, attorneys for respondent," one "H. V. Reardan, attorney for respondent," indorsed "G. D. Buckley, Esq., H. V. Reardan, attorneys for respondent"; the other, in which the point is made, is signed "G. D. Buckley, attorney for respondent." On the argument, both gentlemen appeared and took part.

From this history it seems to us that Mr. Buckley has recognized Mr. Reardan as his associate in the case sufficiently to estop him and his client from *now* saying that Mr. Reardan was not, at the service of notice of motion for a new trial, one of the attorneys for plaintiff, and as such entitled to receive the

service. Mr. Buckley's acts constitute a waiver. Any other view would be as unjust to Mr. Reardan as to the defendant.

Judgment and order reversed, and cause remanded for a new trial.

Thornton, J., concurred.

Sharpstein, J., concurring:

I concur in the reversal of the judgment and order denying defendant's motion for a new trial. As to the point that the notice of motion for a new trial was not served on the plaintiff's attorney of record, I think that it should be disregarded, on the ground that the objection comes too late.

[No. 7,030.—In Bank.]

SACRAMENTO & PLACERVILLE RAILROAD COMPANY *v.* THE SUPERIOR COURT OF SAN FRANCISCO.

Receiver — Jurisdiction — Mortgage — Deed of Trust — Railroad.—The Sacramento and Placerville Railroad Company executed a mortgage or deed of trust upon its property to two trustees, to secure the payment of the principal and interest of certain bonds, and it was provided that upon default in the payment of the principal of the bonds, or upon default for one year in the payment of the interest, the trustees should take possession of the property, and apply the net income to the payment of the principal and interest of the bonds. Default having been made, an action was brought by the surviving trustee to enforce the lien and trust, and to obtain possession of the property, and a receiver was appointed. *Held*, upon an application of the successor in interest of the mortgagor for a writ of prohibition, that the case came within the provision of subdivision 6, § 564 of the Code of Civil Procedure, and that the Court had jurisdiction to make the order.

Application for a writ of certiorari to the Superior Court of the City and County of San Francisco. Hunt, J.

The facts are stated in the opinion.

W. H. L. Barnes, for Plaintiff.

No brief on file.

Geo. Cadwalader, for Defendant.

The Court below was authorized to appoint a receiver, by § 564 of the Code of Civil Procedure, subdivisions 1 to 6. The following authorities are cited to show the usages of Courts of Equity: (*American Bridge Co.* v. *Heidelbach*, 94 U. S. 798; *Davis* v. *Gray*, 16 Wall. 217; *Parkhurst* v. *Kinsman*, 2 Blatchf. 78; *Beecher* v. *Bininger*, 7 id. 170; *Lennox* v. *Latrobe*, Hemp. 225; Jones on Railroad Securities, § 468; *State of Maryland* v. *N. C. R. R. Co.* 18 Md. 194.

Alfred A. Cohen, also for Defendant.

The case comes within the provisions of either of subdivisions 1, 2, 5, and 6 of § 564 of the Code of Civil Procedure.

By the usages of Courts of Equity, a receiver is appointed upon a bill to foreclose a mortgage on a railroad, to receive the income of the mortgaged property, and apply it in satisfaction of the lien. (High on Receivers, §§ 376–8, 380; *Hopkins* v. *Worcester & Birmingham Canal*, Law R. 6 Eq. 437; *De Winton* v. *Mayor of Brecon*, 26 Beav. 533; Jones on Railroad Securities, § 474; *Des Moines Gas Co.* v. *West*, 44 Iowa, 23; *Meaden* v. *Sealey*, 6 Hare, 621; Kerr on Receivers, 53; *Lord Crewe* v. *Edleston*, 1 De Gex & J. 93; id. 109; *Crowe* v. *Halliday*, 2 Ridgway, 58; *Pots* v. *Warwick etc. Canal Co.* Kay's Rep. 147; *Davis* v. *Gray*, 16 Wall. 203; *Saylor* v. *Mocklie*, 9 Iowa, 209.)

Morrison, C. J.:

This is a proceeding under the Code of Civil Procedure, (tit. 1, chap. 1, part iii) to review the action of the late District Court of the Fifteenth Judicial District, in appointing a receiver, and the only question for our consideration relates to the power of the Court below to make such appointment.

It appears, from the return of the writ of review issued out of this Court, that on the 14th day of March, 1864, the defendant (in the original suit) executed and delivered to Danforth N. Barney and Louis McLane a certain mortgage or deed of trust upon its property, to secure the payment of seven hundred

and fifty bonds of the denomination of one thousand dollars each, bearing interest at the rate of ten per cent. per annum. The indenture executed and delivered by the defendant, to secure the payment of the principal and interest of its bonds, contains the following clause: "And the parties of the second part, the survivor of them, and the heirs of such survivor, or their assigns, shall and may at all times after default shall be made in the payment of the principal of said bonds, or any part thereof, or when default for one whole year shall be made in the payment of the interest on any of said bonds, hold, occupy, possess, and enjoy, all and singular, the hereinbefore described lands, tenements, hereditaments, rights, privileges, and franchises, and other premises above granted, bargained, and sold, or mentioned, or intended so to be, with the appurtenances aforesaid, without the let, suit, or hindrance, molestation, or eviction of the said party of the first part, or their successors, or of any person or persons whomsoever lawfully claiming or to claim by, from, or under them; and that the said parties of the second part shall and may, by themselves, their officers, and agents, take, receive, and collect the income and profits of said railroad; first applying the same to the payment and discharge of all current expenses of the said railroad, and the needful repairs thereon; and next to the payment of all taxes that may be due the State of California and the counties through which the said railroad runs, and also the United States; and then to the payment of the interest and principal of said bonds, in such manner as they may deem proper. * * * * * And it is further covenanted, granted, agreed, and understood, by and between the parties to these presents, and the true intent and meaning hereof is, and it is hereby declared to be so, that until default be made in payment of the said principal sum and interest, or some part thereof, aforesaid, it shall and may be lawful to and for the party of the first part, their successors and assigns, to have, hold, possess, occupy, exercise, and enjoy, all and singular, the said lands, tenements, rights, franchises, and privileges, and the said property of all kinds—real, personal, and mixed—and other of the premises, with their appurtenances above bargained, sold, conveyed, and transferred in manner aforesaid, and to have, receive, and take all the rents,

issues, profits, gains, and advantages thereof to their own proper use and benefit."

We find in the mortgage, or deed of trust, (it is immaterial whether it is a deed of trust or simply a mortgage) a power expressly conferred on the parties of the second part, in case default is made in the payment of the principal or interest of said bonds, to enter upon and take possession of the mortgaged property.

On the 26th of October, 1877, Louis McLane filed his complaint in the late District Court of the Fifteenth Judicial District, averring such default of the mortgagors, a demand and refusal to surrender to him the possession of the mortgaged property, or any part thereof, and praying the appointment of a receiver, etc. On the filing of such complaint, an order to show cause was made by the Court below, and on the 29th day of October, 1877, Louis McLane was appointed a receiver of the property embraced in the mortgage, with full power and authority to take and hold the same, and to exercise the powers over the property conferred by the mortgage or deed, until the further order of the Court, unless the defendant, within fifty days after the service on its agents or attorneys of a copy of the order, pay to the plaintiff the amount due on the unpaid bonds and coupons issued and secured by the mortgage. It is this order that the defendant complains of, and we are now called upon to review its legality on certiorari.

Had the Court below power and jurisdiction to make the order appointing Louis McLane a receiver of the property described in the mortgage? If such power was vested in the Court, its action must be sustained, however erroneous it may have been, for the writ brings up the proceedings for review only to the extent of inquiring into and determining the question of jurisdiction.

Section 564 of the Code of Civil Procedure provides that a receiver may be appointed by the Court in which the action is pending, in all cases where receivers have heretofore been appointed by the usages of Courts of Equity. This is not a proceeding to foreclose a mortgage, and to subject the mortgaged property to sale under the decree of the Court, but it is in the nature of a proceeding to enforce specific performance of the

terms and conditions of a mortgage; and we find numerous cases in the books in which Courts of Equity have exercised the jurisdiction complained of in this case. The case of *Shaw and others* v. *Norfolk County Railroad Co. and others*, 5 Gray, 162, is in point. In that case a railroad corporation conveyed all its property and franchise to three trustees by deed, conditioned to be void on payment of certain bonds issued by the corporation, and stipulating that the directors might, upon any breach of conditions, take possession and apply the net proceeds to the purpose of the trust, and it was held that it was competent for a Court of Equity to appoint a receiver. The Court there say: "But the bill may well be maintained by the plaintiffs upon another and different ground. By the contracts expressed in the deed of indenture a trust is created, to the due performance of which they have firmly bound themselves and their successors. In the discharge of the duties thus created and thus assumed, the possession, management, and control of the estates and interests conveyed to them may, and as it seems to us have already, become indispensable. For the due enforcement and regulation of such a trust, ample power is found in the jurisdiction of this Court as a Court of Equity; and the present bill is an appropriate course of proceeding to procure for that purpose the intervention and exercise of its authority. The bill prays for general relief, as well as for a specific decree in relation to the foreclosure of the equity of redemption. And upon the facts stated in it, and which upon the hearing were admitted to be true, we can see no reason why the plaintiffs ought not to be put in immediate possession of the mortgaged property, in order that the purpose for which the conveyance was made may be accomplished, and the trust created by it be properly executed. The defendants have neglected, and still neglect, to pay the interest which has accrued upon a large proportion of the bonds, which were duly issued, and which are held by the creditors of the corporation. These bond-holders are entitled to demand the money which has become due, and it is the duty of the trustees to make use of the discretionary power which was conferred upon them for the express purpose of insuring the payments to which the creditors should severally become entitled. To that end possession of the mortgaged

property is indispensable, and the plaintiffs ought therefore to have a decree by force of which they can obtain it. * * * A decree properly prepared must therefore be entered in behalf of the plaintiffs, entitling them to have immediate possession of all the mortgaged property."

The case of *Ether Shepley et al.* v. *The Atlantic and St. Lawrence Railroad Co. et als.*, 55 Maine, 395, is also in point. This was the case of a mortgage executed by the railroad company to three trustees to secure the payment of certain bonds issued by it, and it was stipulated in the deed that if the company should at any time fail to pay the interest or principal of the bonds according to their tenor, the mortgagees might take the mortgaged property into their actual possession, manage and control the same, and apply the net income and proceeds thereof to the payment of such interest and principal.

It will be seen that the condition of the mortgage in the case in 55th Maine, was substantially the same as the condition in the mortgage in the case now under consideration; and it was there held that the Court had jurisdiction to decree a specific performance of the stipulation in the mortgaged property for the non-payment of the bonds.

In the case of the *American Bridge Co.* v. *Heidelbach*, 94 U. S. 798, a company, to secure the payment of its bonds, mortgaged its property and the rents, issues, and profits arising therefrom, with the provision that if there was default in paying the interest, the mortgagees might take possession of the property mortgaged, manage the same, and receive and collect all rents and claims due and to become due to the company. The Court, speaking of the power conferred upon the mortgagees by this instrument, says: "In this case, upon the default which occurred, the mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a receiver appointed, and possession delivered to him. In either case the income would thereafter have been theirs."

To the same effect is the law as stated in the text-books. We will refer only to one—the latest of these: "A Court of Equity has jurisdiction to order a specific performance of a stipulation in a railroad mortgage, authorizing the trustees to take possession of the mortgaged property for the non-payment of the bonds

secured, and a bill in equity is the proper form of proceeding to compel the company and its agents to deliver possession to the trustees." (Jones on Railroad Securities, § 401.)

But it is unnecessary for us to pursue this subject any further, or to cite any additional cases upon a point which seems to be perfectly well settled by authority.

We are of opinion that it was within the power and jurisdiction of the Court below to make the order complained of in this case, and, therefore, this writ should be discharged.

So ordered.

MYRICK, J., MCKINSTRY, J., ROSS, J., SHARPSTEIN, J., and THORNTON, J., concurred.

[Mr. Justice MCKEE, not having heard the argument, took no part in the decision of this case.]

[No. 6,678.—Department No. 1.]

FITZ v. BYNUM.

RESCISSION — OFFER TO RETURN — CONSIDERATION — FRAUD — CONFLICT OF EVIDENCE.— In an action upon two promissory notes given for stock in a mining corporation, the defense was, that the plaintiff was induced to give the notes by false and fraudulent representations of the payee as to the value of the stock and mine; and the Court instructed the jury to the effect that, if the stock was of any value, the defendant must have offered to return it, or the plaintiff would be entitled to a verdict. *Held*, that the instruction was right; and, the evidence being conflicting on this point and the question of fraud, *held*, a verdict in favor of defendant should not be disturbed.

ID.—MARKET VALUE OF STOCK—DEFINITION.—*Held further*, the sales of the stock appearing to have been only such as the operators could induce their neighbors and acquaintances to take at low and varying rates, that such transactions did not give a *market value* to the stock.

ID.—VALUE OF STOCK—EVIDENCE.—*Held further*, that the point in controversy was whether the stock had value as the mine then was, and that therefore the Court did not err in rejecting evidence as to what the ore might be made to yield by the erection of certain machinery.

APPEAL from a judgment for the defendant, and from an order denying a new trial, in the Sixth District Court, County of Yolo. DENSON, J.

The question asked the witness McCleery (referred to in the opinion) was as follows:

"Question. You have stated that it would not pay to work ore that assayed $40 to $60 per ton, because you have to pay $45 per ton for milling; now, if the company were to put a mill at the mine, say a twenty or forty-stamp mill, and proper machinery—hoisting machinery—upon the mine, could the ore not be worked for much less than $40 per ton?"

The other facts are stated in the opinions.

J. C. Ball, and *J. W. Armstrong*, for Appellant.

The evidence showed, without any conflict, that the stock was of value, and there was no evidence that the defendant offered to return it. Before a person can rescind a contract, he must offer to return everything of value received under the contract. (Civ. Code, § 1691; *Miller* v. *Steen*, 30 Cal. 402; *Gifford* v. *Carvill*, 29 id. 589.

The stock had a market value, and was selling at from fifty cents to a dollar a share.

The Court erred in sustaining the objection to the question put by defendant to the witness McCleery. It might be true that a mine whose ores do not contain over $60 per ton would be valueless without proper machinery, and yet with proper machinery would be worth millions.

S. G. Harper, for Respondent.

The main point urged by counsel on his motion for new trial was that the defendant should have tendered the stock back to Strong. The stock however, was worthless. (The counsel here cited from the testimony in support of this position.)

MYRICK, J.:

The jury rendered a verdict for defendant. Plaintiff moved for a new trial, which was denied, and plaintiff appealed.

Whether the stock, the sale of which was the consideration for the notes in suit, was of value, was a matter properly submitted to the jury: as to this issue, the evidence was conflicting;

therefore the verdict of the jury will not be disturbed. The Court clearly instructed the jury that if the stock had any value, the defendant must have offered to return it, or the plaintiff would be entitled to a verdict. The verdict, therefore, was necessarily based upon the belief on their part, from the evidence, that the stock had no value. The question of *market value* of the stock does not arise in this case. It does not appear that the stock had market value as such. The sales made appear to be only such as the operators could induce their neighbors and acquaintances to take, at prices ranging from fifty cents to a dollar a share, as purchasers could be found. As the witness Strong said: "The stock that I sold, [10,000 shares] I sold for about six bits up to a dollar, ninety cents the most of it, and some at four bits, to elders and preachers. That I gave out of my own pocket to them. I told them so at the time." Such transactions do not appear to us to give *market value* to the property sold; but, rather, transactions made in order to give an *apparent* market value. The price of one dollar per share placed on the stock by the trustees was altogether arbitrary.

It was not error in the Court to sustain the objection to the question put to the witness McCleery, as to what the ore *might* have yielded under some other possible circumstances. The question in controversy was whether the stock had value as the mine then was.

Judgment and order affirmed.

SHARPSTEIN, J., and THORNTON, J., concurred.

By the COURT (in bank, on petition for rehearing):

This case was heard in Department 2 of this Court, and opinion filed August 18th, 1880. Application is made that the case be heard by the Court in bank. In addition to the facts stated in the opinion of the Department, the transcript shows that the defendant, in his answer, alleged that the payee of the note in suit induced defendant to execute the note by fraudulent and false representations as to the value of the mine and its stock, and that the representations were made for the purpose of cheating and defrauding defendant; that he represented the mine and its stock to be of great value, and that $10,000 worth of ore

was on the dump; whereas, in truth and in fact, the stock and mine were of no value. There was evidence given by the parties relating to this issue; the evidence was conflicting; the Court properly instructed the jury regarding it, and the verdict is conclusive. Hearing in bank denied.

[No. 10,501.—In Bank.]

PEOPLE v. GALLAGHER.

DRAWING OF GRAND JURY — NOTICE. — If the officers required by § 215 of the Code of Civil Procedure, to be present at the drawing of the grand jury, are actually present, it is immaterial whether any notice is given to them by the clerk.

ID. — CONSTITUTIONAL LAW — COUNTY JUDGE — SUPERIOR JUDGE. — It would seem that it was intended by the new Constitution (Schedule, § 3) that the Superior Judge should succeed to the duty of the County Judge in respect to the drawing of jurors.

ID.—ID.—ID.— PARTIAL REPEAL OF STATUTE. — Section 215 of the Code of Civil Procedure is not inconsistent with the Constitution, except in the provision requiring the presence of the County Judge: and, with this exception, it continues in operation by virtue of § 1 of the Schedule.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Superior Court of Placer County. MYERS, J.

John M. Fulweiler, for Appellant.

Attorney-General, for Respondent.

By the COURT (from the bench):

The defendant, not having been held to answer before the grand jury, moved, at the proper time, that the indictment be set aside upon the grounds: First, that notice of the drawing of the grand jury was not given as required by law; second, that the drawing was not had in the presence of the officers designated by law, etc.

The motion was denied, and defendant excepted.

The drawing was regular. Verbal notice alone was given by the clerk to the Superior Judge and Sheriff, but inasmuch

as the object of the provision requiring notice is only that those officers may be present, and as the case shows that both were, in fact, present when the drawing was had, it is entirely immaterial whether *any* notice was given them.

Section 215 of the Code of Civil Procedure requires that the clerk shall notify the Sheriff and *County Judge*. It would seem that it was intended that the Superior Judge should succeed to the duty of the County Judge in respect to the drawing of jurors. (Const. Schedule, § 3.) But even if there be doubt of this, the statute, in respect to the mode of drawing, is not "inconsistent" with the Constitution, except in the particular that there is no longer a County Judge. In other respects, it continues in operation and effect by virtue of section *one* of the *Schedule*. It follows that the grand jurors were regularly drawn, the *clerk* and *Sheriff* being present.

Judgment and order affirmed.

[No. 10,516.—In Bank.]

PEOPLE *v.* BOJORQUEZ.

EVIDENCE—CRIMINAL LAW.—The testimony of a witness taken down by the Justice of the Peace, upon the preliminary examination of the defendant in the indictment, is inadmissible on the trial of the indictment, except in the cases specified in § 686 of the Penal Code.

ID.—ID.—OBJECTION TO TESTIMONY.—*Held*, accordingly, that such testimony was inadmissible where it appeared that the witness was within reach of the subpœna of the Court, but too unwell to appear; and *held*, *further*, that an objection to the testimony, that it was *incompetent*, was sufficient.

APPEAL from a judgment for the plaintiff, in the Superior Court of Kern County. BRUNDAGE, J.

Thomas Rhodes, and *N. A. Gregg*, for Appellant.

Attorney-General, for Respondent.

By the COURT, (from the bench):

At the trial the District Attorney offered the deposition of Frank Drake. The Court inquired of the under-sheriff pres-

ent what was "the condition" of Drake? The officer replied: "He is unwell; not able to leave his room, I don't think," and added that he had been in that condition for almost two weeks. Thereupon the Court permitted the deposition to be read.

The deposition, as is stated in the bill of exceptions, was the "testimony" of the witness Drake, taken down by the Justice of the Peace, on the preliminary examination of defendant under the charge in the indictment.

The defendant objected to the introduction of the "testimony" as being *incompetent*, irrelevant, and immaterial. The objection was overruled, and exception noted.

The Penal Code, § 686, permits such a deposition to be read at the trial only in certain cases, no one of which is, that the witness, although within reach of process of subpœna, is too unwell to appear before the jury. The deposition was, therefore, *incompetent*, and as the deposition contained the *testimony*, the latter also was incompetent.

We think it would be hypercritical to hold that the language employed by defendant's counsel in making his objection did not sufficiently point to the proposition, that the deposition was inadmissible, because the absence of the witness was not accounted for in such manner as would alone render the deposition competent.

Judgment reversed, and cause remanded for a new trial.

MEMORANDA OF CASES

Not Fully Reported,

DECIDED AT THE

APRIL SESSION OF THE COURT, 1880.

[No. 6,616.—Department No. 1.]

FREEMAN *v.* BROWN.

SETTING ASIDE DEFAULT—DISCRETION OF COURT.

APPEAL from an order setting aside a judgment by default, in the Fourteenth District Court, County of Placer. REARDON, J.

An order was made in the Court below, overruling defendant's demurrer, and allowing him twenty days to answer; and at the same time, (as appears by an extract from the minutes) by consent, it was ordered that the case be continued for the term. The defendant failing to answer within the twenty days allowed, a judgment by default was entered against him, which was afterward set aside by the Court. The affidavit upon which the default was opened was by the defendant's attorney, and was to the effect that the demurrer was not heard on the first day of the term, as was the usual practice of the Court, but was called up upon special notice at a later day; that it was the custom of affiant to take memoranda of orders made at the beginning of the term, but that, for the reasons above stated, he failed, through inadvertence to make any mem-

orandum of the order in question; that affiant was engaged in other matters during the remainder of the term—forgot all about the case; that defendant had stated the facts constituting his defense to affiant, as stated in the proposed answer filed with the affidavit, and that affiant engaged and fully intended to file an answer, etc.

The stipulation referred to in the opinion was for the entry of the order for the continuance of the case referred to above.

J. M. Fulweiler, and *C. A. Tuttle*, for Appellants.

Hale & Craig, for Respondent.

By the COURT:

We are inclined to think that the Court had authority to consider the stipulation in connection with the affidavit, and that the stipulation and affidavit justified it in making the order. We will affirm this order.

Order affirmed.

[No. 6,527.—Department No. 1.]

RENKEN *v.* BELLMER ET AL.

MORTGAGE—NOTE—DELIVERY.

APPEAL from a judgment for the plaintiff, in the Sixth District Court, County of Sacramento. DENSON, J.

The complaint alleges the execution of the note and mortgage sued upon, on June 12th, 1876. The answer of defendant Wm. Kleinsorge denies "that *the note* * * was executed and delivered to said plaintiff on the 12th day of June, 1878, or at any time prior to the 20th day of February, 1876"; and alleges that on that day the defendants Bellmer and Charles Kleinsorge, the mortgagors, were adjudged bankrupt; and the defendant, William Kleinsorge, appointed assignee, and that the note was thereafter delivered by the defendant Bellmer. The Court found all the allegations of the complaint to be true, and also

all the allegations of the answer except the allegation as to the note and mortgage, and these it found to be untrue.

The defendant Bellmer testified in effect that he and his partner (defendant Charles Kleinsorge) used in their business certain money of the plaintiff, (which was in witness's hands as his attorney in fact) and that the note and mortgage in suit was executed by them to secure the repayment of this money; that the witness delivered the mortgage to the Recorder for record, supposing and intending that to be a good delivery; that the plaintiff was notified of the transaction and approved it, and afterward wrote to the witness for the interest, which was paid up to February, 1877; that witness delivered the note to the plaintiff's attorney in April, 1878.

The defendant Wm. Kleinsorge testified that he found the mortgage in the safe of the other defendants, in a package with other papers of theirs, when he was appointed assignee.

L. S. Taylor, for Appellant.

The only question in this case is as to the fact of the delivery of the mortgage at a time preceding the adjudication in bankruptcy; at any time when the bankrupts had authority to deliver it. The note was not delivered. The mortgage was placed in the hands of the Recorder for record. The suit is brought upon the theory that the note was a valid note, and had been executed and delivered, and the mortgage was foreclosed to pay that note.

A. C. Freeman, for Respondent.

The pleadings *admit* the execution and delivery of the mortgage, June 12th, 1876, which was nearly two years prior to the adjudication in bankruptcy. But if the delivery were not admitted, the only question would be, can a mortgagor, who owes money, and who makes, signs, and acknowledges, and files for record a mortgage, believing and intending it to be a valid delivery, who notifies the mortgagee that he has taken the money on the note and mortgage, and receives a letter back ratifying the transaction, and who receives from the mortgagee in Germany a demand for the payment of interest, and who pays one

year's interest upon that note and mortgage nearly one year prior to the adjudication in bankruptcy—could he, a year after that, had he not become a bankrupt, repudiate the transaction, and say that that was not a valid delivery? If *he* could not, the assignee in bankruptcy cannot.

McKINSTRY, J., for the Court:

We think there was sufficient delivery of the note and mortgage, and the judgment must be affirmed, and it is so ordered.

[No. 6,967.—Department No. 1.]

POULSON *v.* HOSKINS.

STATEMENT ON MOTION FOR NEW TRIAL—EXTENSION OF TIME—BREACH OF CONTRACT—DAMAGES.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Tenth District Court, County of Colusa. KEYSER, J.

The complaint alleged that the defendant agreed to repair the plaintiff's soda-water apparatus for the sum of $200; that the work was unskillfully done, and that the plaintiff suffered damage thereby in the sum of $3,000, as follows: to wit, that plaintiff lost his entire summer's work; expended four or five hundred dollars for materials, which were spoilt; employed two men at $65 and $75 per month, from May to August, 1879, and had no business for them by reason of defendant's breach of contract; that the soda water manufactured by him was of inferior quality, and spoiled in the hands of his customers, thereby utterly ruining the reputation of plaintiff as a soda-water manufacturer; that plaintiff's credit was materially injured, and his business ruined; and that, if defendant had performed his contract, plaintiff would have realized a net profit from his business of $2,000. The answer was a general denial, and the verdict and judgment was for $1,100 and costs.

The statement on motion for new trial was stricken out, on motion of respondent's attorneys, because not filed in time.

Marshall Craig, and *Grant & Jackson Hatch*, for Appellant.

The damages alleged in the complaint are speculative, consequential, and remote. (*Selden* v. *Cushman*, 20 Cal. 57.)

Hart & Hart, for Respondent.

The complaint in this case is for breach of contract. There was no demurrer. The evidence is stricken out, and there is no record of the instructions.

The COURT:

Judgment and order affirmed.

[No. 7,105.—Department No. 1.]

CREDITORS *v.* WELCH.

CHANGE OF PLACE OF TRIAL—INSOLVENCY PROCEEDINGS—JURISDICTION.

APPEAL, by defendant, from an order refusing to change the place of trial, in the Superior Court of Butte County. HUNDLEY, J.

The case in the Court below was a proceeding commenced in the County Court of Butte County, by the creditors of W. H. Welch, to have him adjudged a bankrupt.

J. C. Bull, and *J. W. Armstrong*, for Appellants.

Dunlap & Van Fleet, for Respondents.

The COURT:

This is an appeal from an order denying a motion for a change of the place of trial. The evidence in respect to the residence of defendant was conflicting, and we are not authorized to reverse the finding of the Court below as to the fact.

Order affirmed.

[No. 7,003—Department No. 2.]

SMITH *v.* SILSBY ET AL.

PROMISSORY NOTE—FRAUD—ASSIGNEE—CONFLICT OF EVIDENCE—FINDINGS.

APPEAL from a judgment for the defendants, and from an order denying a new trial, in the Tenth District Court, County of Colusa. KEYSER, J.

Belcher & Belcher, *W. F. Goad*, and *H. M. Alberry*, for Appellants.

Grey & Gale, and *A. L. Hart*, for Respondents.

MORRISON, C. J.:

This is an action on a promissory note executed by respondents Blodgett, and Stockwell, and W. H. Silsby, to one Tapscott, and by Tapscott assigned to the plaintiff. The execution of the note is admitted, but the answer sets up fraud in procuring its execution.

Silsby & Co. were indebted to Tapscott, and through the joint agency and influence of debtors and creditors, the defendants Blodgett and Stockwell were induced to sign the note as sureties for the principal debtors, Silsby & Co.

It appears from the evidence that the note sued on was made for the sole use and benefit of Silsby & Co., they receiving the entire consideration, and that the defendants Stockwell and Blodgett signed the note as sureties only, and that, to secure them against loss, Silsby & Co. executed to them a second mortgage on certain lands in Colusa County.

The answer avers that Tapscott and Silsby falsely and fraudulently represented to Stockwell and Blodgett that the land upon which they took a second mortgage as security was incumbered to the amount of only nine dollars and fifty cents per acre, and that Tapscott and Silsby well knew at the time they made such false and fraudulent representations that it was mortgaged to the amount of twenty-two dollars per acre, its full value. The Court found that fraudulent representations of the character set up in the answer were made by Tapscott and Sils-

by, and in our opinion the evidence in the case fully justified such finding. It results, therefore, that the defendants had a good defense to the note in the hands of Tapscott.

It is claimed, however, that the plaintiff Smith was a *bona fide* holder of the note for value, and that he took it by assignment before its maturity. As to this issue, the Court also found in favor of the defendants. We have carefully examined the evidence in the case and find it very conflicting. The statements of Tapscott are in many material particulars in conflict with the evidence of the plaintiff Smith, as to the date and circumstances connected with the assignment and possession of the note; and in addition to this we find that Tapscott stated in the presence of the witness Coover and others, that he had assigned the note to one Frank Goad, and also that the plaintiff Smith stated in the presence and hearing of the witness Oates, that "he had nothing to do with the note, and did not want anything to do with it." There are other circumstances in the case of a character tending to impeach the *bona fides* of the assignment of the note in question. The plaintiff Smith, and Tapscot the payee of the note, were closely related by affinity; the note was in the possession and under the control of Tapscott long after the pretended assignment; the note was indorsed by Tapscott, and his signature was afterward erased. Tapscott handed the note to the notary Robinson for protest without mentioning the name of Smith (a fact sworn to by Robinson but denied by Tapscott); and we have the still more significant fact testified to by the plaintiff himself, that when Tapscott told him he had the note, Smith remarked: "You will be fooled with that note, the same as you were with those other fellows' notes. These big farmers are bursting up all the time."

Why did he purchase the note and pay full value therefor, as he pretends to have done, under such circumstances? It is not our purpose or duty herein to go into a full analysis of the evidence for the purpose of determining upon which side of the case there was a preponderance of evidence, for it is sufficient for us to know that there was a substantial conflict in the evidence. The rule is well settled by numerous cases, that this Court will not interfere with the judgments of the Court below in cases in which there was a substantial conflict in the evidence.

We find in the transcript sufficient evidence to justify the conclusions arrived at by the learned Judge who tried the case, that the note sued on was obtained by fraud, and that the plaintiff was not a *bona fide* holder for value.

Judgment and order affirmed.

MYRICK, J., and SHARPSTEIN, J., concurred.

[No. 6,939.—In Bank.]

THE PEOPLE EX REL. BURRIDGE *v.* PEARSON.

DISBARRING OF ATTORNEY—UNPROFESSIONAL CONDUCT.

INFORMATION in the Supreme Court, against R. West Pearson, for unprofessional conduct.

A. M. Heslep, for the Informant.

C. W. Bryant, and *H. G. Sieberst*, for the Defendant.

SHARPSTEIN, J.:

This is a proceeding upon information, to have the respondent, who is an attorney and counsellor of this Court, removed, and to have his name stricken from the roll of attorneys and counsellors of this Court, on the ground that he has violated his duties as such attorney and counsellor.

He is accused, in and by the information filed herein, of having agreed with one Eliza Burridge to procure a divorce for her from her husband, for the sum of $45. That she paid respondent that sum, and that he prepared a complaint, which she verified, in which it was alleged that the said Eliza was married to her said husband on the 2nd day of September, 1877, and that her said husband had neglected to provide for her the common necessaries of life, he having the ability to do so, and that said willful neglect had continued for a period of more than one year next preceding the commencement of said action. It is charged in the information, that said Eliza was not married on

said 2nd day of September, 1877, nor until the 2nd day of September, 1878, and had only been married about seven months when said complaint was verified, and that she so informed respondent at the time she verified said complaint. That complaint was never filed, although a copy of a summons was attached to it. The complaint was entitled in the Fifteenth and the summons in the Nineteenth District Court. Afterward, but within less than one year after said marriage, another complaint was prepared and verified, and filed in the Fourth District Court, which contained the same allegations as the first, in relation to the marriage of the parties and the willful neglect of the husband. It does not appear that any proceedings were ever had in the latter action beyond the filing of a demurrer to the complaint by the husband.

It is charged, and the charge is supported by the testimony of both the parties to that action for divorce, that the respondent was not only told, but repeatedly told, that the parties were not married on the 2nd day of September, 1877, as alleged in the complaint, but that they were married one year thereafter, and several months less than one year before the commencement of said last mentioned action. And the plaintiff, in that action, states in her testimony, that when she informed the respondent herein that the allegation in respect of said marriage was not correct, he took a pen and pretended to correct it. It appears, however, on the face of the complaints, that no such correction was made in either case.

There are some other charges of disreputable acts which it is unnecessary to notice at this time. It is sufficient for the purposes of this proceeding, that it is shown, by uncontradicted evidence, that the respondent prepared a complaint, and advised his client to verify it, which alleged things which he knew to be false, and which, she states, he led her to suppose had been corrected before she verified it. Nor is it necessary to comment upon the conduct here disclosed. The respondent has not answered the accusations against him, although abundant time in which to answer them has been allowed him. He introduced no evidence in his own behalf, and did not even cross-examine the witnesses who testified against him.

Therefore, it is ordered that the name of Robert West Pear-

son be stricken from the roll of attorneys and counsellors of this Court, and that he be permanently deprived of the right to practice as an attorney and counsellor in the courts of this State.

MYRICK, J., THORNTON, J., ROSS, J., MCKEE, J., and MCKINSTRY, J., concurred.

[No. 6,855.—Department No. 1.]

DONELLY v. POTTER.

CONTESTED ELECTION—QUALIFICATION OF VOTER—RESIDENCE.

APPEAL from a judgment for the plaintiff, (contestant) in the County Court of the County of Amador. BROWN, J.

The proceeding in the Court below was to contest the election of the defendant as Supervisor in District No. 3, Amador County.

The Court found that Hines (referred to in the opinion) was, at the time of the election, a resident of Eldorado County, and not an elector of the county of Amador; and that Askwith was formerly a resident and elector of Amador County, but that more than two years before the election he removed with his family to Iowa, and whilst there voted for local officers; and he returned to the county of Amador a few months before the election; that when he left Amador County for Iowa, he intended to return, but did not know when.

On the trial, Hines (called by contestant) testified in effect as follows: "I reside in Eldorado County. I stop there. * * Have been living in Eldorado County for about five years. * * * I came from San Francisco to Plymouth, Amador County, about seven years ago, and worked there at the Phenix Mine for about two years, and then went to work upon the ditch bringing water to that mine, in employment of the same company. I was registered on the Great Register of * * * Amador County, on a transfer from San Francisco. * * * I claim Plymouth as my home. I have always voted at Ply-

mouth since I first came there. My employment on the ditch is temporary and uncertain. I always vote at Plymouth, and always return there when out of employment. I have never intended to make my home in Eldorado County. I never voted there. I have never intended to change my residence from Plymouth. * * * I always board at a hotel while at Plymouth. I am unmarried, and own no property except my clothing."

The ballot referred to in the opinion, as mentioned at folio 74 of the transcript, was as follows:

"32 Supervisors 3rd District, E. S. Potter.

"33 Justice of the Peace, D. Donelly"—

the name "J. S. Porter" being erased, and the name "D. Donelly" written with black-lead pencil.

Farley & Porter, and *Young & Young*, for Appellant:

Cited, with reference to the votes of Hines and Askwith, *Dow* v. *Gould & Curry S. M. Co.* 31 Cal. 650; *People* v. *Stonecifer*, 6 id. 405; *Desmare* v. *U. S.* 3 Otto, 610; and, with reference to the ballot set forth above, McCrary Am. Elect. Law, §§ 407, 396; Cooley's Const. Lim. 607, 611–612, 697 n.; *People* v. *Seaman*, 5 Denio, 409; *People* v. *Saxton*, 22 N. Y. 309; *People* v. *McManus*, 34 Barb. 620; *People* v. *Pease*, 27 N. Y. 45; *People* v. *Cicotte*, 16 Mich. 283; Pol. Code, § 1201.

A. C. Adams, for Respondent.

The COURT:

This is a case of contested election. The position of appellant, as stated by his counsel, is: "The Court below found, at folio 44, that Potter and Donelly each received 599 votes; at folio 46 that three votes should be deducted from Potter, which left the vote standing, 596 for Potter, and 599 for Donelly. Two of the three votes thus deducted—Hines and Askwith—we claim, as hereinbefore, ought to have been counted for Potter, thereby giving him 598; and the vote at folio 74 ought to be deducted from Donelly and added to Potter, which would make the vote stand, finally, for E. S. Potter 599 votes, D.

Donelly 598 votes, and this view, we think, is fully and clearly sustained by the authorities."

The evidence, as presented in the record before us, sustains the finding of the Court below, that neither Hines nor Askwith was a qualified resident.

Their votes were, therefore, properly deducted from the count for appellant.

Assuming the statement of counsel to be correct in other respects—and we agree that the ballot mentioned at folio 74 of the transcript should not have been counted for respondent, and ought to have been counted for appellant—the vote would stand: For respondent, 598; for appellant, 597.

Judgment affirmed.

[No. 7,150.—Department No. 1.]

WILSON v. HIS CREDITORS.

MEETING OF CREDITORS—NOTICE—INSOLVENCY PROCEEDINGS.

APPEAL from an order sustaining the opposition of Jacob Kahn, a judgment creditor, to the statement and report of the assignee, in the Superior Court of the County of Colusa. HATCH, J.

H. M. Alberry, for Appellant.

John T. Harrington, for Respondent.

McKINSTRY, J.:

Plaintiff filed his petition in insolvency in the County Court of Colusa County. The Court made an order that the creditors show cause, etc. The clerk issued the proper notice to the creditors to appear on the first day of December, 1879, and the first publication was made November 1st, 1879.

The language of the statute is: "The judge granting an order for a meeting of the creditors, shall direct the clerk of the court to issue a notice, calling the creditors of the insolvent to be and

appear upon a specified day, not less than thirty * * * days from the first publication of such notice," etc. (Acts of 1852, p. 69.)

The statute does not require that the creditors shall have full thirty days' notice *from* (and after) the day of the final publication, but that they shall appear *on a day*, which day shall be not less than thirty days from the day of the first publication. The return day here was not less than thirty, but just thirty days from the first publication.

Order reversed, and the Court below directed to enter such order for the distribution of the moneys in the hands of the assignee, as may be proper.

McKEE, J., and ROSS, J., concurred.

[No. 6,465.—Department No. 1.]

LINNELL *v.* FRAZER.

The COURT:

Upon the authority of *Bocdefield* v. *Read*, No. 6,480, the judgment is reversed, and cause remanded.

[No. 6,806.—Department No. 1.]

GREEN *v.* CAMPBELL.

The COURT:

Upon the authority of *Hayes* v. *Campbell*, 55 Cal. 000, judgment reversed, and cause remanded to the Superior Court of Sacramento County for a new trial.

[No. 7,149.—Department No. 1.]

JOHNSON v. WRIGHT.

By the COURT:

On the authority of *Johnson* v. *Squires*, No. 7,148, judgment reversed, and cause remanded to the Court below for a new trial.

[No. 6,739.—Department No. 2.]

JONES v. BRYAN ET AL.

SPECIFIC PERFORMANCE OF PAROLE CONTRACT—PURCHASER IN GOOD FAITH—CONFLICT OF EVIDENCE—FINDINGS.

APPEAL from a judgment for defendant, and from an order denying a new trial, in the Fourteenth District Court, County of Placer. REARDON, J.

Hale & Craig, and *J. M. Fulweiler*, for Appellant.

B. F. Myers, for Respondents.

SHARPSTEIN, J.:

This action is brought to compel the specific performance of an alleged unwritten contract between plaintiff and defendant Bryan, to convey certain lands to plaintiff, which, before suit, had been conveyed by defendant Bryan to defendant Powell, who, it is alleged, had notice of said unwritten contract.

Defendant Bryan, in his answer, denies that he ever entered into any such contract, or that defendant Powell ever had notice of it. Defendant Powell, in his answer, denies that he purchased with notice, and alleges that he is a *bona fide* purchaser for value.

Both of them testified, on the trial, to the facts stated in their answers. The plaintiff, on the other hand, testified to the facts set up in his complaint, and introduced some testimony which tended to corroborate him.

The appellant claims that the judgment should be reversed, on the ground that the weight of evidence is in favor of the plaintiff and against the defendants, and that the whole of the evidence taken together supports the allegations of the complaint. We cannot assent to those propositions. The testimony is conflicting upon the material issues raised by the pleadings, and it was for the Court below to determine to which side the weight or preponderance of it inclined. This has been held too often by this Court to require any citation of authorities in support of it.

Judgment and order denying a new trial affirmed.

MYRICK, J., and THORNTON, J., concurred.

JULY SESSION, 1880.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT,

JULY SESSION, 1880.

[No. 7,202.—Department No. 1.]

BERRYMAN *v.* PERKINS, GOVERNOR, ETC.

CONSTRUCTION OF STATUTE — MANDAMUS — UNIVERSITY — ASYLUM FOR THE DEAF, DUMB, AND BLIND.—Under the fourth section of the Act of April 1st, 1876, (cited in the opinion) "to provide for a supply of water for the University and for the Asylum for the Deaf, Dumb, and Blind," the power to approve or disapprove of the appraisal, made under the act, is vested in the Governor, and his discretion in the matter cannot be controlled by mandamus.

MOTION to dismiss an application for a writ of mandamus to George C. Perkins, Governor of the State of California, to compel him to make and file a certificate approving a valuation of certain springs, etc., made by the Superior Court of Alameda County, under the Act of April 1st, 1876, cited in the opinion.

Attorney-General, and *John B. Mhoon*, for the motion.

The decree under the act is inoperative until the "written certificate by the Governor approving the valuation" has been filed in the action. The act of approving the valuation necessarily involves an examination of the subject, and the exercise of official judgment and discretion; and the rule is universal, that in such cases mandamus will not lie. (Code Civ. Proc. §

1085; High's Ext. Leg. Rem, §§ 42–3; Moses on Mandamus, 82; *Middleton* v. *Low*, 30 Cal. 596; *McDougall* v. *Bell*, 4 id. 177; *Tilden* v. *Sacramento Co.* 41 id. 68; *Harpending* v. *Haight*, 39 id. 208; *U. S.* v. *Seaman*, 17 How. 225; Wood on Mandamus, 65; *Queen* v. *Kensington*, 12 Q. B. 654.)

W. W. Cope, and *Wm. M. Pierson*, *contra*.

The intention of the Legislature was, that the Governor should authenticate in some official way the award made by the decree, so as to furnish to the Controller the executive audit for the drawing of the warrant. Without some such provision the Controller could have no official knowledge of any demand against the State. At most, the Governor had only the power to examine the *mode* of proceeding for the purpose of ascertaining if that proceeding had been conducted as required by the act. (*Koppikus* v. *The State Capitol Commissioners*, 16 Cal. 255; *Stockton R. R. Co.* v. *Stockton*, 51 id. 328; *People* v. *Supervisors of Alameda Co.* 45 id. 395; *People* v. *Supervisors of San Luis Obispo Co.* 50 id. 561; *Village of Glenco* v. *The People*, 78 Ill. 382.)

McKINSTRY, J.:

The fourth section of the Act of April 1st, 1876, "to provide for a supply of water for the University and for the Asylum for the Deaf, Dumb, and Blind," (Stat. 1875–6, p. 316) authorizes the Controller to draw his warrants for the appraised value of property sought to be condemned—"upon a judgment being rendered for the condemnation of said springs and lands and right of way, and appraising the value thereof, *and upon the filing in said proceeding of a written certificate of the Governor appraising such valuation*."

The statute requires, as conditions precedent to the taking of the land and water for public uses, not only that the land shall be appraised by the Superior Court, a jury, or commissioners, but also that such appraisal shall be approved by the Governor. Until he shall concur with the appraisal, the condemnation cannot be made operative. This necessarily involves an inquiry and ascertainment of the actual value of the property, and the

employment of judgment and discretion on the part of the Governor. The power to determine whether the appraisal is correct is his, and we cannot deprive him of his discretion or adjudicate the value for him. In all matters resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie to control the discretion or determine the decision which is to be made. (High's Ex. Rem. 42; Moses on Mandamus, 82; *Harpending* v. *Haight*, 39 Cal. 208.)

It is not necessary to inquire whether the Governor might be compelled to make inquiry in respect to the value of the property—if it should be made to appear that he had refused to make such inquiry. The application here is, that he be compelled to issue his certificate *approving* the valuation.

ROSS, J., and THORNTON, J., concurred.

[By agreement between MCKEE, J., and THORNTON, J., the latter acted for the former in this case.]

[No. 7,070.—In Bank.]

SHEEHY *v.* HOLMES.

PROHIBITION — JURISDICTION — REMOVAL OF CAUSE TO FEDERAL COURT.—In an action by citizens of the State, against a citizen and an alien, upon a joint and several obligation, (the amount in controversy being over $500) the alien defendant applied to the Court in due form and time, for a removal of the cause to the United States Circuit Court; and, his motion being refused, applied to this Court for a writ of *prohibition*. *Held*, that he was entitled to the writ.

APPLICATION for a writ of prohibition to HOLMES, Judge of the Superior Court of Fresno County.

The original action was brought by B. F. Gibbons and Delilah Kates, against John Sheehy, (the plaintiff in this proceeding) and J. E. Linsley; and the complaint alleged that the defendants were indebted to the plaintiff jointly in the sum of $15,000, and that they "jointly and severally undertook and promised to pay to the plaintiff the said sum of $15,000, on or before the 26th day of November, 1879."

The petition for the writ alleges that the petitioner is an alien, and the other defendant and the plaintiff citizens of this State; that the complaint (of which a copy is attached) was filed, and summons issued and served upon petitioner; that before the time for answering expired, the petitioner entered his appearance, and at the same time filed his petition and the proper bond for the removal of the cause to the United States Circuit Court, and that the petition was denied. A supplemental petition, filed by leave of Court, alleges that the petitioner, since the filing of his petition, had, in pursuance of the statutes of the United States in such case made and provided, obtained a certified copy of the record in the original case and filed the same in the United States Circuit Court, and that that Court had assumed and acquired jurisdiction of the case.

H. S. Dixon, and *J. H. Smyth*, for Plaintiff.

Every ground for the writ exists. (3 Bl. Com. 112; *State* v. *Com. of Ronds*, 12 Am. Dec. 596, and note.) The Court acted judicially. (*Kanouse* v. *Martin*, 15 How. 198; *Francisco* v. *M. I. Co.* 36 Cal. 286.) There is no other plain, speedy, and adequate remedy. (*Fremont* v. *Crippen*, 10 Cal. 215; affirmed in *Babcock* v. *Goodrich*, 47 id. 508.) No appeal lies. (*Brooks* v. *Calderwood*, 19 Cal. 125; *Francisco* v. *M. I. Co.*, cited *supra*.)

Prohibition does not lie from the Federal Courts. (High. Ex. Rem. § 787; *In re Bininger*, 7 Blatchf. 159.)

Mandamus does not lie from the Federal Courts. (*McIntire* v. *Wood*, 7 Cranch, 504; *Lath Co.* v. *Amy*, 13 Wall. 241; U. S. Rev. Stat. § 639; *In re Cronic*, 2 Biss. 160.) Nor from this Court. (*Francisco* v. *M. I. Co.* cited *supra*.)

Certiorari does not lie from the Federal Courts. (U. S. Rev. Stat. § 645; Dillon on Removal, etc. 44 N. Y. 56.) Nor from this Court. (*People* v. *Co. Judge*, 40 Cal. 480.)

Injunction does not lie from the Federal Courts. (U. S. Rev. Stat. § 720; *Diggs* v. *Wolcott*, 4 Cranch, 179.) Nor from the State Courts; as this Court has no jurisdiction to issue it, and one Superior Court cannot enjoin proceedings of another. (*Uhlfelder* v. *Levy*, 9 Cal. 607.)

Further proceedings of the Court below, after the petitioner

has taken proper proceedings for the removal of the case, are without and in excess of the jurisdiction of the Court. (*Gordon* v. *Longest*, 16 Peters, 97; *Kanouse* v. *Martin*, 15 How. 198; *Insurance Co.* v. *Dunn*, 19 Wall. 223; *Hatch* v. *Chicago etc. R. R. Co.* 6 Blatchf. 117; *Fisk* v. *Union Pacific R. R. Co.* id. 362; S. C. 8 Blatchf. 243; *Matthews* v. *Lyall*, 6 McLean, 13; *Webster* v. *Crothers*, 1 Dill. 300; *Cobb* v. *G. etc. Co.* 6 Reporter, 515; *Arthur* v. *N. E. etc. Co.* 7 id. 329; *Taylor* v. *Rockafeller*, 6 id. 226; *Stoker* v. *Leavenworth*, 7 La. 394; *Oakey* v. *C. & R. R. Bank*, 14 id. 515; *Franciseus* v. *Surget*, 6 Rob. 33; *Rosenfield* v. *Adams Express Co.* 21 La. An. 233; *State* v. *Judges*, 23 id. 29; *Sneed* v. *Brownlow*, 4 Cold. 253; *Williams* v. *Atkins*, 6 Cold. 615; *Stewart* v. *Mordecai*, 40 Ga. 1; *Livermore* v. *Jenks*, 11 How. Pr. 479; *Steven* v. *P. Ins. Co.* 41 N. Y. 154; *Bell* v. *Dix*, 49 N. Y. 238; *Shaft* v. *P. M. Ins. Co.* 67 N. Y. 544; *Mix* v. *Andes etc. Co.* 6 Reporter 373; *Edwards* v. *Ward*, 2 Bush, 607; *Stanley* v. *C. & R. I. R. R. Co.* 62 Mo. 508; *Berry* v. *C. & R. R. R. Co.* 64 id. 534; *The Two Orphans*, 2 Cent. L. J. 730.)

The action being on a joint and several obligation, neither defendant is a necessary party as to the other. (Code Civ. Proc. §§ 383, 414; *Kelley* v. *Bandini*, 50 Cal. 530.) The petitioner was, therefore, entitled to a removal. (U. S. Rev. Stat. § 639; *Sands* v. *Smith*, 1 Dill. 290; *Wormser* v. *Dahlman*, 7 Reporter, 740; *Goodenough* v. *Warren*, 3 Pac. C. L. J. 255; *Gibbon* v. *Sheehy*, 5 Pac. C. L. J. 633.) There can be no traverse of the fact alleged in the petition for removal (*Rosenfeld* v. *Adams*, 21 La. An. 233; *Stewart* v. *Mordecai*, 40 Ga. 1); nor was any attempt made to deny them.

No brief on file for Defendant.

The COURT:

In this cause no answer has been filed by the respondent, nor was there any appearance on his behalf at the hearing. We have examined the case, and think the petitioner entitled to the writ prayed for.

Let the peremptory writ issue.

[No. 7,212.—Department No. 2.]

BOARD OF TRUSTEES OF THE STATE LIBRARY *v.* D. M. KENFIELD.

STATE LIBRARY—TRUSTEES.—The Board of Trustees of the State Library are authorized to draw from the State treasury, at any time, all the moneys therein belonging to the library fund.

ID.—ID.—LIBRARIAN—BOARD OF EXAMINERS — CLAIMS — DEFINITION. — Bills for books purchased for the State Library are not *claims* within the meaning of § 660 of the Political Code, and need not be presented to the Board of Examiners.

MANDAMUS to D. M. Kenfield, Controller, etc.

Freeman & Bates, for Plaintiff:

Cited, Pol. Code, § 2293, subd. 6; § 433, subd. 17, and § 2300.

Attorney-General, for Defendant.

Section 2293 of the Political Code must be construed in the light of the Constitution, (§ 22, art. iv) which provides that "no money shall be drawn from the treasury, but in consequence of appropriations made by law, and *upon warrants duly drawn thereon by the Controller*." By § 672 of the Political Code, it is provided that the Controller shall not draw his warrant for any purpose until the matter has been properly passed upon by the Board of Examiners, except in those cases which the Legislature, by *special provisions*, have exempted from the operation of the statute. What is meant by *a special provision* is illustrated by the former law providing for the government of the library. (Stat. 1861, pp. 45–46.)

MYRICK, J.:

This is an application for a writ of mandate, requiring the respondent, State Controller, to draw his warrant upon the State Treasurer, in favor of petitioners, for moneys in the State treasury belonging to the State Library fund. The objection is urged by respondent that the books, etc., required by the library should first be purchased, and the claims therefor be presented to the Board of Examiners for their inspection and

approval. We do not think that the transactions of the Board of Trustees are the basis of claims within the meaning of § 660, Political Code. The chapter of the Political Code relating to the State Library, places the library under the control of the Board of Trustees, and authorizes the board "to draw from the State treasury, at any time, all the moneys therein belonging to the library fund; 'and the librarian is to purchase books, maps, engravings, paintings, and furniture for the library,' according to such rules and regulations as the Board of Trustees may prescribe." Their judgment, then, as to what books, etc., may be proper to be added to the library, is not subject to review by the Board of Examiners.

Let the writ issue as prayed for.

SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 7,253.—In Bank.]

EARLE *v.* THE BOARD OF EDUCATION OF SAN FRANCISCO.

THE TRAYLOR ACT—CONSTITUTIONAL LAW—LOCAL ACT—DEFINITION.—The act approved April 2nd, 1880, entitled "An act to add a new section to the Political Code, to be known as section 1618, relating to salaries of school teachers in cities having 100,000 inhabitants or more," is *local* in its character, and therefore unconstitutional.

ID.—ID.—MANAGEMENT OF COMMON SCHOOLS—DEFINITION.—The fixing of the salaries of teachers is a part of the *management* of the schools, and comes within the meaning of that term as used in subd. 27, § 25, art. iv of the Constitution.

ID.—ID.—AMENDMENT—DEFINITION.—The act referred to is not an amendment of the Political Code.

APPEAL from a judgment for the plaintiff, in the Superior Court of the City and County of San Francisco. WILSON, J.

The proceeding in the Court below was mandamus, to compel the defendant to approve and allow the demand of the plaintiff for salary as teacher in the public schools.

Rhodes & Barstow, and *W. W. Morrow*, for Plaintiff.

Garber, Thornton & Bishop, for Defendant.

Ross, J.:

This cause presents but one question: Is the act approved April 2nd, 1880, and commonly known as the Traylor Act, in violation of the Constitution of the State? The act is entitled, "An Act to add a new section to the Political Code, to be known as section 1618, relating to salaries of school teachers in cities having 100,000 inhabitants or more," and establishes the salaries to be paid to the teachers in the public schools "in all consolidated cities and counties containing more than 100,000 inhabitants."

Section 5 of art. ix, of the Constitution declares:

"The Legislature shall provide for a system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."

By § 25 of art. iv, it is provided that "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

"First— * * * *

"Twenty-seventh—Providing for the management of common schools. * * * *

"Thirty-third—In all other cases where a general law can be made applicable."

We entertain no doubt that the fixing of the salaries of the teachers is as much a part of the "management" of the schools as is the employment of teachers, or the grading of classes. Ordinarily, an important part of the contract of employment of any one to serve in any capacity, is the fixing of the compensation for the services to be rendered, and there is nothing in the Constitution to indicate that the word "management" was used in the connection in which it is found in any other than its ordinary sense.

If, therefore, the act in question is special or local in its character, it is expressly prohibited by the 27th subdivision of § 25. That it is local in its nature and in its operation seems to us plain. It may not be an easy matter to define with precision

the distinction between a general law and one that is special or local. In a note to Sedgwick on the Construction of Statutory and Constitutional Law, (2nd ed. p. 529) it is said: "An act is local when the subject relates to a portion only of the people or their property, and may not, either in its subject, operation, or immediate necessary results, affect the people of the State or their property in general."

Burrill, in his Law Dictionary, (vol. 2, pages 153-4) defines the word "local" as follows: "Relating to place; expressive of place; belonging to or confined to a particular place; distinguished from general, personal, or transitory."

Looking at the Traylor Act, we see that it only purports to deal with salaries of teachers in consolidated cities and counties containing more than 100,000 inhabitants.

Whether we take judicial notice of the fact that there is in the State one such city and county or not, we do know that this act does not make provision for the salaries of the teachers in any city, county, or district in the State, outside of consolidated cities and counties of the population mentioned, and that it is entirely confined as to its subject and in its operation, if not to a specified locality, at least to specified localities. It would seem to follow, necessarily, that it is local as contradistinguished from general, and therefore within the constitutional inhibition already quoted.

This view renders it unnecessary to consider whether the act is also violative of the 33rd subdivision of § 25 of art. iv of the Constitution.

It is said that the question whether a general law can be made applicable is one for the discretion of the Legislature and not for the courts. It is true that it has been so decided, but under constitutions not containing a declaration that its provisions "are mandatory and prohibitory, unless by express words they are declared to be otherwise," as does the present Constitution of this State. It may be—although we do not so decide—that it would be the duty of the *Court*, under these provisions, to say whether a general law could be made applicable, in order to determine, in a given case, whether the act in question contravened that provision of the Constitution prohibiting the Legislature from passing any special or local law where a gen-

eral one can be made applicable. But, as observed already, it is unnecessary in this case to determine that question.

It is contended that the Traylor Act is but an amendment to the Political Code, that the Political Code contains a general law upon the subject to which the Traylor Act relates, and that by this sort of tacking the latter act is converted into a general law. We cannot appreciate the logic or force of the argument. The question is, had the Legislature the constitutional power to pass the act under consideration? If it is a general law it had, and no resort to the Political Code is needed to uphold it. It is good of and by itself. If it is a special or local law, then it comes directly within the inhibition of the Constitution, and never had any validity, for the Legislature had no power to enact it. We do not understand how any law can be amended by a void act.

But the Traylor Act is in no sense an amendment to the Political Code. It is entitled, "An Act to add a *new section* to the Political Code, to be known as section one thousand six hundred and eighteen," etc., and its first section is: "A *new section* is hereby added to said Political Code, to be known as and numbered sixteen hundred and eighteen, and to read as follows," etc.

The new section is to follow immediately § 1617 of the Political Code, which, so far as necessary to be quoted, reads thus: "The powers of boards of trustees of school districts, and of boards of education in cities, are as follows: * * * 7. To employ the teachers, janitors, and employés of schools; to fix and order paid their compensation."

The new section, which is a subsequent act, declares that in consolidated cities and counties of a certain population the salaries of teachers shall be certain sums respectively. The subsequent act, if anything, is, to the extent it goes, a repeal by implication of the seventh subdivision of § 1617, but in no sense is it an amendment. If an amendment, what does it amend? The Political Code, or some particular section of it? If treated as an amendment at all, it is in direct conflict with § 24 of article ix, of the Constitution, which declares that * * * "no law shall be revised or amended by reference to its title; but in such case, the act revised or section amended shall be re-enacted, and published at length as revised or amended." * * *

There is no pretense here that the law, whatever it is, supposed to have been amended by the Traylor Act, was re-enacted and published at length *as amended*, as is expressly required by the Constitution. If this law is to be upheld as an amendment, it seems to us it would be opening the door to the accomplishment by indirection of many of the evils it was manifestly intended by the framers of the Constitution directly to prevent, and thus wipe out some of its most salutary provisions. To maintain the Constitution as it is, is our first duty, and whenever it is encroached upon, we are bound to assert its supremacy.

Judgment reversed and cause remanded, with directions to sustain the demurrer to the petition.

MORRISON, C. J., concurred.

MCKINSTRY, J., concurring:

I concur in the judgment, and in the opinion of Mr. Justice Ross.

1. It may be admitted that a portion of a statute is repealed (by implication) when a subsequent statute is passed containing provisions so far in conflict with such portions of the first that the provisions of the new and the part of the older statute cannot coexist. In such case, however, the provisions of the latter, which operate a repeal of a portion of the older statute, are not, properly speaking, *amendments* of the older law. The last expression of the legislative will is an original law, to which are applicable the provisions of the Constitution, requiring that every law of certain classes shall be "general," and that it shall embrace but one subject, to be "expressed in its title." (Const. art. iv, §§ 24, 25.) The Traylor Act is therefore not an amendment of the Political Code.

2. But if, on the other hand, the Traylor Act can, for any purpose, be treated as an intended amendment of any portion of the Political Code, it is an amendment of the section thereof with which it conflicts, to wit, § 1617. Subdivision 7 of that section authorizes "the boards of trustees in school districts, and the boards of education in cities," to employ all *teachers*, and fix and order paid their compensation. The Traylor Act takes from the local boards the power of fixing the salaries of

teachers in a certain class of cities and counties. Section 24 of article iv of the Constitution declares that no law shall be amended by reference to its title, but in such case, the section amended shall be "re-enacted and published at length." The Traylor Act is not a re-enactment of § 1617 of the Political Code *as amended.*

3. I desire to add, even if the Traylor Act could be considered as an amendment of the Political Code, and the two, read together, could be treated as one law, such law would not be a "general law" within the meaning of those terms as employed in the Constitution. The Political Code purports to be, and in fact is, one statute, since it was passed through both houses of the Legislature and signed by the Governor as a single statute, and is entitled "An Act to establish a Political Code." It treats of a variety of subjects, not only furnishing a different rule for different localities with respect to many of them, but as to many of its provisions not applying to certain localities at all.

MYRICK, J., concurring:

I concur. The act in question does not purport to, and does not, in fact, deal with a rate of salaries applicable to the State at large. The Constitution, § 5, article ix, says that the Legislature shall provide for a system of common schools, by which a free school shall be kept up and supported in each district, etc. The term "district" is defined, Political Code, § 1576. The act in question, which was approved April 2nd, 1880, upon its face deals with a portion only, in fact with only one locality. It is, therefore, special, if not local in terms, and is within the prohibition of article iv, § 25, subdivision 27, of the Constitution, which is, that the Legislature shall not pass a special law providing for the management of common schools.

A special law is one referring to a selected *class*, as well as to a *particular object*. This act refers to a selected class, viz., teachers in cities of one hundred thousand inhabitants or more. I have no doubt that the Legislature may fix rates of salaries throughout the State, and in so doing, may grade; or it may confer the power upon the local boards; but to fix the salaries

in a class of towns, and leave the balance to be regulated by the local authorities, is, in my opinion, special legislation. (See Worcester's Dic. "Special"; Bouv. Law Dic. same; 12 N. Y. 595.)

Subdivision 20, § 25, article iv, prohibits the passage of special or local laws changing county seats. Could it be said not to be *special* legislation to pass a law changing county seats of all counties having more than one hundred thousand inhabitants, and prescribing another mode for counties having a less population?

By subdivision 33, the Legislature is prohibited from passing a special or local law "in all other cases where a general law can be made applicable." Cannot a general law fixing salaries, or prescribing a mode for fixing salaries, be made applicable to the entire State?

On the 7th of April, 1880, an act was passed relating to the public schools generally, and by that act, the Board of Education has power to fix the compensation of teachers. (§ 1617, subd. 7, amdts. Pol. Code, 1880, p. 36.) It is proper to suggest, that by the Constitution the educational department is made a State care, as distinguished from municipal, and that the regulation of schools in the City and County of San Francisco does not remain unchangeable under the "Consolidation Act." This view is in keeping with my concurring opinion in *Desmond* v. *Dunn*, 55 Cal. 242. It is not in conflict with *People ex. rel. Beckwith* v. *The Board of Education etc.*, opinion filed June 22nd, 1880. The Consolidation Act may remain for *municipal* purposes—that is, city and county government—yet the educational department, as a State matter, be subject under the Constitution to general laws passed for that purpose.

SHARPSTEIN, J., dissenting:

I dissent. The principal, if not the only ground relied upon by those who deny the constitutionality of the "Traylor Act," is that it contravenes subdivision 27 of § 25 of article iv of the Constitution. That clause reads as follows: "The Legislature shall not pass local or special laws providing for the management of common schools." If this act does not provide "for

the management of common schools," or is not a "local or special" law, it is not obnoxious to the objection that it violates that clause of the Constitution.

The first question which I shall consider is, whether or not the "Traylor Act" is a law "providing for the management of common schools." If it is, I think that it should be held unconstitutional, on the ground that the subject of the act is not expressed in its title. (Const. § 24, art. iv.) The act is entitled, "An Act to add a new section to the Political Code, to be known as section one thousand six hundred and eighteen, relating to salaries of school teachers in cities having one hundred thousand inhabitants or more." If this title was selected to express the subject of an act "providing for the management of common schools," it seems to me that the Legislature could not have gone much wider of the mark. I do not think that any one would expect to find, under that title, anything providing for the *management* of common schools, nor do I think that this act contains any such provision. It relates to teachers' salaries, and the salaries of teachers have about as much to do with the management of common schools as the salaries of judges have to do with the administration of justice. If this act had been entitled "An Act to add a new section to the Political Code, to be known as section one thousand six hundred and eighteen, *providing for the management of common schools* in cities having one hundred thousand inhabitants or more," the title would have expressed what is now claimed to be the subject of the act. But I cannot help thinking that the inappropriateness of such a title, if it had been placed at the head of this act, would be patent to every one who should read both the title and the act. The Legislature may, if it sees fit, increase the salaries of the Judges of the Superior Courts of this State. If such an act is ever passed, I do not think that it will be entitled "An Act to provide for the management of courts of justice," and yet it would be quite as much an act providing for their management as this is "for the management of common schools." It does not seem to me that an act which should authorize some school district to erect a school-house would be an act providing for the management of common schools. And yet the sums paid for the erection of school-houses enter quite as much into the management

of the schools as the salaries paid to teachers. It is just as necessary to have school-houses as it is to have teachers. People may be educated without either of them. But the management of a school is a matter entirely distinct from the building of school-houses or the payment of teachers; and I think that the constitutional prohibition against the passage of local or special laws providing for the management of common schools relates solely to the manner of conducting such schools, and that it simply prohibits the passage of any local or special law, prescribing the manner in which common schools shall be conducted. It would be strange if it were otherwise. No one doubts the impracticability of having the salaries of teachers generally fixed by the Legislature. And yet it is made its duty to provide a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established. (Const. § 5, art. v.) Now it is conceded that the Legislature might, by the passage of a general law, directly fix the salaries of teachers. It is denied, however, that the Legislature can fix them in any district unless it does so in all the districts; which, as we have observed, is impracticable. If this position be correct, it is in the power of any district in the State to defeat the provision that requires that a free school shall be kept up in each district, by refusing to pay salaries sufficient in amount to secure the services of teachers. If the Constitution had left it optional with the inhabitants of each school district to have a free school or not, this point would be without force. But, in the absence of that option, I do not believe that the constitutional requirements can be so easily defeated.

The next question is, whether the Traylor Act is a local or a special law within any well-settled definition of the terms *local* or *special* laws. I do not think that it is.

1. The doctrine is elementary that an amendment of a statute by a subsequent act operates precisely as if the subject-matter of the amendment had been incorporated in the prior act at the time of its adoption, so far as regards any action had after the amendment is made. Under that rule the "Traylor Act" must be viewed in the same light now, so far as this case is concerned, as it would be if it had constituted a part of the original act at

the time of its passage. The Political Code, as amended by the "Traylor Act," provides a system by which a free school shall be kept up in and supported in each district of the State. Among other things, it fixes the compensation of teachers in consolidated cities and counties of one hundred thousand or more inhabitants, and confers the power to fix their compensation upon the boards of education of cities of a less population, and upon the trustees of schools in districts outside of cities and consolidated cities and counties. If I am correct, in regarding the section added by the Traylor Act as if it had been in the original act at the time of its passage, it is impossible for me to perceive why it should be more obnoxious to that objection than one which confers the power to fix the compensation of teachers upon boards of education in cities containing a population of less than one hundred thousand, or the one which confers the same power upon boards of trustees in school districts. Each of these clauses is different from either of the others in respect of the body by which the compensation is fixed, and to be fixed. If one can be detached from the context and be pronounced *special* or *local*, may not either of the other two be subjected to the same process? The chapter of the Code which relates to the establishment and support of common schools, is undoubtedly a general law within any known definition of that phrase.

2. As an independent act, it seems to me that the "Traylor Act" should be held to be a general law. Neither the term "special law" or "local law" has been defined with the exactitude that most law phrases have been. Perhaps neither is susceptible of a very nice definition. Cases are not wanting, however, in which particular enactments were held to be special or local, and others to be general. In *Holland's Case*, it is said: "The rule of law is, that of general statutes the judges ought to take notice, although not pleaded—otherwise of special or particular statutes." (4 Co. 76 a.) In Indiana, it has been held that a special law "is such as at common law the courts would not notice, unless it were specially pleaded and proved like any other fact." (*High* v. *The State*, 24 Ind. 28; *Toledo etc. Ry. Co.* v. *Nordyke*, 27 id. 95.) In the same State, it was held that a law which related to a particular class of cases, and to them alone, was not a special law. (*Hymes* v. *Aydelott*, 26

Ind. 431.) One clause of a section of a statute of New York provided, that thereafter all actions against the mayor, aldermen, and commonalty of the city of New York should be brought in the Supreme Court, and that that court should have exclusive cognizance of such actions. The Superior Court held that it was essentially public in its object and purposes, and not private or local. (*Bretz* v. *Mayor etc. of New York*, 6 Rob. [N. Y.] 325.) Of an act entitled "An Act in relation to the payment and compensation of certain officers in the city and county of New York," the Superior Court said: "We do not feel warranted in holding that the act in question is local, within the meaning of the Constitution." (*Connor* v. *The City of New York*, 2 Sand. 355.) And when the same case was before the Court of Appeals, (1 Seld. 285) Foote, J., said: "Regulating the amount and manner of paying the officers, or a given number of the officers of a county of this State, for their official services, when such services are rendered in and form part of the administration and execution of the laws of this State, and affect the citizens thereof who come within their range, can neither be private nor local in the view contemplated by the Constitution." An act relating to roads in Baltimore County was held not to be a special law in any sense of the term. (*Webster* v. *County Commissioners etc.* 29 Md. 516.) The Constitution of Pennsylvania provides that "the General Assembly shall not pass any local or special law * * * regulating the affairs of counties, cities, townships, wards, boroughs, or school districts, * * * *nor shall they indirectly enact such special or local laws by the partial repeal of a general law.*" It was held, however, that a law applicable to cities containing a population exceeding 300,000, although there was only one city in the State having that number of inhabitants, was constitutional. (*Wheeler* v. *Philadelphia*, 77 Pa. St. 338.) In that case, the Court said: "The true question is, not whether classification is authorized by the terms of the Constitution, but whether it is expressly prohibited." The Court further said: "That a statute which relates to persons or things as a class, is a general law." A case involving a similar question, afterward came before the same Court, and it said: "We adhere to that decision (*Wheeler* v. *Philadelphia*, *supra*) and indeed, cannot see

how the question of power could have been decided differently. To say that no general law can be passed to regulate a certain subject, because some of the classes contained in the regulation do not yet exist, or exist only in a limited number, is to hold that no law can be passed to provide for future wants or necessities." (*Kilgore* v. *Magee*, 85 Pa. St. 401.)

It was urged on the argument in behalf of respondent, that the power to fix the salaries of teachers is given to the Board of Education by the Consolidation Act, which constitutes the charter of the municipal corporation of the City and County of San Francisco. I think that the counsel mistakes the fact. The act under which I understand that the respondent claims to derive its power to fix the salaries of teachers is entitled "An act to provide for the support of the Common Schools of the City and County of San Francisco, and to define the powers and duties of the Board of Education thereof," approved April 1st, 1872. If I am correct as to the fact, the maxim, "*Leges posteriores priores contrarias abrogant*," would seem to apply in this case.

The question whether the provisions of this act, if opposed to any of the provisions of the Consolidation Act, should be held to repeal such repugnant provisions of the latter act, does not arise in this case. That the Consolidation Act cannot be repealed or amended by any general act of incorporation until a majority of the electors of the City and County of San Francisco determine to become organized under such general act, seems to me to be sufficiently clear; and that is as far as the *dictum* in *Desmond* v. *Dunn*, as I understand it, goes. The case at bar presents this state of facts:

The Legislature, in 1872, conferred the power upon the respondent to fix the salaries of teachers, and in 1880 the Legislature took that power away from the respondent, and resumed the right which it always had of directly exercising that power itself. It is urged, however, that the Legislature could not accomplish this by amending the Political Code in the manner in which it is attempted to be done in the Traylor Act. This raises a very serious question, as a very large proportion of all the enactments of the late Legislature are of the same character. I now have before me a volume entitled "Acts Amenda-

tory of the Codes," and it seems to me that they are all obnoxious to the same objection as the Traylor Act. In a clear case this would not be entitled to any weight, but in a case of doubtful construction, it should have great weight.

I am, therefore, of the opinion that the judgment of the Court below should be affirmed.

THORNTON, J., dissenting:

I dissent, and concur in the conclusion reached by SHARPSTEIN, J.

[No. 6,286.—In Bank.]

ECK *v.* HOFFMAN.

ATTACHMENT—CONTRACT PAYABLE IN THIS STATE—DEFINITION.—If a contract is not made in this State, there must be an express stipulation that it shall be paid in this State, in order to authorize the issuance of an attachment in an action upon it, (under § 537, subd. 1, Code Civ. Proc.)

ID.—RESIDENCE.—The defendants, upon the facts stated in the opinion, *held* to be residents of this State.

APPEAL from an order dissolving an attachment, in the Twelfth District Court. DAINGERFIELD, J.

The facts are stated in the opinion.

T. H. Rearden, for Appellant.

Paul Neuman, and *Henry Eichhoff*, for Respondents.

SHARPSTEIN, J.:

This is an action upon three several dishonored bills of exchange, drawn by one of the defendants upon the other in favor of the plaintiff. The drawee defendant accepted the bills before their maturity. At that time all the parties resided in Germany, and the bills were drawn and payable there. After the acceptance and before the maturity of the bills, both of the defendants left Germany and came to the United States under an assumed name, which they adhered to until the commencement of this ac-

tion. They arrived in New York in the month of July, 1877, and came from there to San Francisco the same month, where they remained until the following October, when they purchased a farm in Sonoma County, in this State, and immediately went to live upon it. They remained upon it until the commencement of this action, a period of about eight months, although they have seemed desirous much of the time to sell it. At the time of the issuance of the summons, the plaintiff sued out a writ of attachment in this action, upon an affidavit which stated that the bills sued on were payable in this State, and that the defendants were non-residents thereof. The affidavit did not state that there was any express stipulation that the bills should be paid in this State, nor did it deny that the defendants came and remained here as above stated. The theory was that although the bills were drawn at one place in Germany, and payable in the same country, on their dishonor they became payable wherever the defendants might be found. That is true in a general sense, but that is not the sense in which the phrase "is made or is payable in this State" is used in the statute. If a contract is not made in this State, there must be an express stipulation that it shall be paid in this State to authorize the issuance of an attachment in an action upon it. That was settled more than a quarter of a century ago in *Dalton* v. *Shelton*, 3 Cal. 206, and although there have been several revisions of the statute since, and changes have been made in the very sections containing the clauses construed in that case, those clauses have remained unchanged. Upon well-settled principles, the Court must regard the construction given to the statute in that case as a correct interpretation of the intention of the Legislature. Otherwise that body would have changed the statute in that respect.

The only other question we have to consider is, whether the defendants were residents or non-residents of this State at the time of the commencement of this action. And conceding all that is claimed by the plaintiff—that they left Germany and came to the United States as absconding debtors; that the debt sued upon was fraudulently contracted; that the defendants assumed a fictitious name for the purpose of more successfully eluding the vigilance of their creditors, and that they have ad-

vertised their farm for sale, and have said that in the event of selling it they would leave the United States—we fail to perceive that the non-residence of the defendants is established.

The rules by which this question must be determined are the same, whether the persons whose residence is disputed are honest or dishonest men. We are aware of the impossibility of reconciling the decisions upon what does or does not constitute a residence, but we have never met with any case, nor has any been cited, in which it has ever been held that acts similar to those of the defendants in this case were not sufficient to establish a residence. If the defendants had come to this State free of debt, we do not think that the question of their residence would admit of the slightest doubt. And the question whether they did so come or not, is in our opinion, wholly immaterial.

We therefore think that the order of the Court dissolving the attachment should be affirmed.

The question of the correctness of the order of the Court giving leave to the plaintiff to amend his affidavit for the attachment, was discussed before us, but as the party who objected to that order has not appealed from it, we have treated the case as if that order was properly made, without intending to decide that question, for the reason that it does not arise upon this appeal.

Order dissolving the attachment affirmed.

MORRISON, C. J., ROSS, J., THORNTON, J., MCKINSTRY, J., and MCKEE, J., concurred.

[No. 10527.—In Bank.]

WREDEN v. THE SUPERIOR COURT OF STANISLAUS COUNTY.

PROHIBITION—JURISDICTION—MOTION TO DISMISS INFORMATION.—A writ of prohibition will not lie to restrain a Superior Court from passing upon a motion to dismiss an information.

PROHIBITION to the Superior Court of Stanislaus County. HEWELL, J.

W. E. Turner, and Wm. D. Minor, for the Plaintiff.

No brief on file for defendant.

McKEE, J.

Where a motion is made in a Superior Court to vacate and set aside an information, upon the ground that the depositions and evidence transmitted to the Court by the committing magistrate, and on which the information was filed, showed that the defendant had committed a higher offense than the crime of manslaughter, for which he had been held to answer, a writ of prohibition will not be granted to prevent the Court, on the hearing of the motion, from looking into and considering the depositions and evidence transmitted to it and on file among the papers of the case. For as the Court has jurisdiction of the subject-matter of the action and of the person of the defendant, it can, in the exercise of its jurisdiction, hear and determine any motion which may be made therein; and for that purpose may refer to and consider any papers on file in the case, or offered on the hearing of the motion, and do any and all things necessary and proper to a complete exercise of its jurisdiction.

In the petition, there is no averment that the Superior Court is about to dismiss the information, or that it will decide the motion before it erroneously or irregularly; and we cannot undertake to determine whether it will err or not in the decision which it may render: but if it should err, the law has provided ample remedy. Any error committed in the decision of a motion can be saved by a bill of exceptions, and be disposed of by appeal, or any other method of review known to the law;

but judicial acts, which are the subject of review by these ordinary and adequate remedies, are not the subject of prohibition. The mere fact, if such were the fact, that a court is about to act erroneously or irregularly in a matter of which it has jurisdiction, will not warrant the issuance of a writ of prohibition. Such a writ cannot be used to prescribe what a court shall or shall not consider in a matter before it and within its jurisdiction, any more than a writ of mandate can be used to compel a court how or what to decide. To do either would be to interfere with the judicial functions of a court.

Application for writ denied.

SHARPSTEIN, J., MYRICK, J., and THORNTON, J., concurred.

[MORRISON, C. J., ROSS, J., and MCKINSTRY J., did not sit in the argument of this cause.]

[No. 6,478—In Bank.]

JONES v. CHALFANT.

SET-OFF—ASSIGNMENT.—Upon a motion by the defendant to set off against a judgment rendered against him, a judgment against the plaintiff assigned to him by another, he must show that he is the absolute and beneficial owner of the judgment, or he cannot set it off.

APPEAL from an order denying a motion of the defendant made after final judgment, in the Nineteenth District Court, City and County of San Francisco. WHEELER, J.

Geo. A. Nourse, for Appellant.

S. Rosenbaum, for Respondent.

The COURT:

The opinion heretofore announced in this cause in Department No. 2, will stand as the opinion of the Court herein.

The order appealed from is affirmed.

The opinion of Department No. 2 referred to, is as follows:

THORNTON, J.:

On the 17th of September, 1877, in the Nineteenth District Court, a verdict was rendered herein in favor of Jones against Chalfant for the sum of $1,217. Judgment does not appear to have been entered on this verdict until the 28th of January, 1878, when it was entered for the amount above mentioned, and for $345.35, cost of suit. Chalfant subsequently moved to set off against this judgment, a judgment recovered by one A. W. Hall against the plaintiff herein (Jones) on the 4th day of August, 1874, in the Seventh District Court, for the County of Mendocino, for the sum of $7,129.66 and $999.05 costs, which defendant (Chalfant) claims had been on the 28th of September, 1877, assigned to him by Hall. The motion came on to be heard on the 5th of April, 1878, at which time defendant read in support of it the judgment roll in the action of *Hall* v. *Jones*, above referred to. In this action it appeared that Hall recovered judgment against Jones for the sum stated above, on the day before mentioned. The defendant proved that there had been made by execution, and paid on this judgment, $788 on the 22nd of September, 1874, and $495.66 on the 12th day of March, 1875; that as to the remainder due on this judgment, executions had been returned unsatisfied. Defendant further read in evidence an assignment of this judgment by Hall to Chalfant, a notice of the assignment signed by Chalfant and directed to Jones, and an affidavit of a service of the notice on Jones. The assignment bears date the 28th of September, 1877, and the notice appears from the affidavit to have been served on Jones on the same day at 6 o'clock P. M. The plaintiff, Jones, offered in evidence his answer to the notice, a petition of Howe and Rosenbaum, his attorneys in this action, and an assignment of the judgment herein by him to Howe and Rosenbaum. This last named assignment bears date the 28th of September, 1877.

The answer, so styled, set up among other things, that Chalfant never in fact paid any consideration to Hall for the assignment made to him, and that he (Jones) was not the owner of the judgment when the assignment was made to Chalfant by Hall, having, on the 27th day of September, 1877, assigned it for value received to Howe and Rosenbaum.

The petition of Howe and Rosenbaum alleged that they are the attorneys of plaintiff in this action, and are the owners by assignment of the judgment herein made by Jones to them; that the assignment was made in consideration of moneys advanced, and an indebtedness to them by Jones for legal services in this case and others, which assignment was executed to them before they had any notice of the assignment of the judgment of *Hall* v. *Jones* to defendant. It is denied also in this petition that Chalfant paid anything for the assignment to him. On the 1st day of November, 1878, the Court below denied the motion, and from this order defendant appealed.

The ownership of the judgment by Chalfant was attacked by plaintiff. The assignee must show that he is really the absolute owner of the judgment, or he cannot set it off. (*Turner* v. *Satterlee*, 7 Cowen, 480; *Mason* v. *Knowlson*, 1 Hill, 218; *Meador* v. *Rhyne*, 11 Rich L. R. 631; *Aikin* v. *Satterlee*, 1 Paige, 288.) And further, there was evidence before the Court of an assignment by Jones to Howe and Rosenbaum.

Whether Chalfant had such an ownership of the judgment of *Hall* v. *Jones*, that he could legally use it as a set-off, and whether Jones had executed the assignment to Howe and Rosenbaum before the assignment to Chalfant was executed to him by Hall, involved questions of fact which the Court below was called on to decide. These questions were decided by that Court adversely to the claims of the appellant, and we see no error in the record which would justify this Court in reversing the order.

We are not satisfied upon the evidence appearing in the transcript, that the appellant was the absolute owner of the judgment recovered by Hall against Jones, and that he held the beneficial control of it.

MYRICK, J., and SHARPSTEIN, J., concurred.

[No. 5,958.—In Bank.]

McLERAN *v.* McNAMARA.

DISMISSAL OF ACTION—STIPULATION—MAXIM.—In an action of ejectment, (prior to the adoption of the Codes) a stipulation was filed, and an entry thereof made in the register, dismissing the action as to certain defendants and as to part of the land, but no judgment was entered thereon by the clerk. *Held*, that if it was necessary for a formal judgment to be entered, the law would consider that as done which ought to have been done.

ID.—ID.—ID.—STAY OF EXECUTION—JURISDICTION.—A plaintiff, who obtains judgment in violation of his written stipulation on file dismissing the action, may be restrained by the court in which judgment was obtained, from enforcing it.

ID.—ID.—The attorney for the plaintiff has power to dismiss the action by virtue of his general authority, and a stipulation to that effect does not depend for its efficiency upon a special consent or authority given him by the plaintiff.

APPEAL from an order perpetually staying the execution of a writ of possession, in the Fourth District Court, City and County of San Francisco. MORRISON, J.

B. S. Brooks, for Appellant.

If the stipulation was signed and filed, it did not change the complaint, nor dismiss the suit as to block 23. There was no entry made in the clerk's register of any dismissal as to that block. Nor was any judgment entered. The order to show cause was sued out more than three years after the entry of judgment, and after the Court had lost all control of it. If there is any relief in this case, it ought to be by a new action. To allow this record to be impeached upon affidavits reduces the record to a value hardly appreciable.

McAllister & *Bergin*, for Respondents Noon and wife.

The stipulation having dismissed the action as to blocks 22 and 23, they were no longer within the jurisdiction of the Court. (*Windsor* v. *McVeigh*, 93 U. S. Rep. 276; *Bonds* v. *Hickman*, 29 Cal. 461; *Norwood* v. *Kenfield*, 34 id. 329.) The Court had power to correct its judgment and process. (*Rousset* v. *Boyle*, 45 Cal. 64.)

M. Lynch, for Respondents Fitzpatrick et al.

The dismissal of the action as to block 23 was a final judgment as to that property, in favor of all the defendants. (Freeman on Judgments, 25–6; *Dowling* v. *Polack*, 18 Cal. 625; *Leese* v. *Sherwood*, 21 id. 151; *Karth* v. *Light*, 15 id. 324.) The judgment afterward entered was void as to that block for want of jurisdiction. The Court had power to correct its judgment and process, and to order a perpetual stay of execution. (Freeman on Judgments, 66; *Rousset* v. *Boyle*, cited *supra*; Freeman on Executions, 45, and authorities cited; id. 54, 80; Herman on Executions, 619–620.)

Jarboe & Harrison, for Respondent Corcoran.

Sharpstein, J.:

This is an appeal from orders made by the Court perpetually staying execution of the writ of possession issued in this action, as to Mission Block No. 23, in the City and County of San Francisco. It appears by the affidavits upon which the orders appealed from were made, that this action in ejectment was commenced on the 3rd day of May, 1865, against a large number of defendants, to recover possession of a tract of forty-eight acres, within which Mission Block 23 was included. Among the defendants named in the complaint, were John Fitzpatrick, William Corcoran, Patrick Noon, Margaret Noon his wife, John N. Risdon, William Ware, Michael Wallace, and one Patterson. These defendants, with the exception of the two last named, claimed to be the owners and in the possession of Mission Blocks 22 and 23. Whether Patterson and Wallace were in possession of any part of the premises, does not appear by the transcript.

On the 19th of March, 1866, a stipulation, of which the following is a copy, duly entitled in the cause, was filed in the office of the clerk of the Court in which the action was pending:

"The above entitled action is hereby dismissed and discontinued as against defendants J. N. Risdon, sued as J. A. Risdon; William Ware, Michael Wallace, sued herein as —— ——; —— Patterson, sued herein as —— ——, and also as against

and in regard to the blocks of land situated in the City and County of San Francisco, State of California, known and designated upon the official map of said city and county, as Mission Addition, or Mission Blocks, Nos. twenty-two (22) and twenty-three (23). March 17th, 1866.

"(Signed) Sloan & Provines, Plaintiff's Attorneys."

That Messrs. Sloan & Provines were the attorneys of the plaintiff at that time is not disputed, and it seems to be conceded that the signature is in the handwriting of Mr. Sloan, who, at that time, was a member of the firm, and who had this case particularly in charge. He died on the 25th of August, 1866, and within the next eighteen months the surviving partner of the firm, Mr. Provines, substituted the present attorney of the plaintiff, in place of the former attorneys. On the 8th of November, 1872, said action was dismissed as to the defendants John Fitzpatrick and William Corcoran, on the ground that the summons had not been served upon either of them. The cause was afterward tried, and on the 7th of January, 1874, a judgment was rendered in favor of the plaintiff and against certain of the defendants as to whom the action had not been dismissed, for the possession of the premises described in the complaint, including said Mission Block No. 23. On the 6th of April, 1877, a writ of possession was issued upon the judgment, and placed in the hands of the Sheriff, who, by virtue thereof, was about to remove the defendants Corcoran, Noon and wife, and one Judson, the successor in interest of John Fitzpatrick, from said block No. 23, when, upon motion made upon affidavits, stating the foregoing facts among others, the Court granted the orders from which this appeal is taken.

If full force and effect be given to the stipulation dismissing the action as to said block 23, it is difficult to conceive upon what ground said orders can be held to be erroneous. Of the authority of the attorneys of the plaintiff to bind him by such a stipulation, we entertain no doubt. The statute then and ever since in force gives to an attorney and counsellor authority "to bind his client in any of the steps of an action, or proceeding, by his *agreement in writing filed with the clerk*, or entered upon the minutes of the court, and not otherwise." If this stipulation was binding upon the plaintiff when it was made, it bound him not to prosecute the action any further as to block 23.

The Practice Act, then in force, provided that an action might be dismissed "by the plaintiff himself at any time before trial, upon the payment of costs, if a counter-claim has not been made." This clause is contained in the first subdivision of the section. In the fifth subdivision of the same section, this passage occurs: "The dismissal mentioned in the first two subdivisions shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly."

This certainly cannot mean that the plaintiff shall make an entry of dismissal in the clerk's register. All entries in that are made by the clerk, and none are ever made in it by either of the parties. The meaning of that clause doubtless is, that when a plaintiff dismisses an action, the clerk shall enter such dismissal in his register.

There was an entry, however, in the clerk's register which reads as follows:

"Discontinuance as to defendants Risdon, Ware, Wallace, and Patterson filed"; and as the action as to them and said blocks 22 and 23 was dismissed by one and the same instrument on file, we think that there was a substantial compliance with the law requiring the entry of the dismissal in the clerk's register, and that the dismissal became effective as soon as it was so filed and entered in the clerk's register. If the plaintiff chose to dismiss an action brought by himself as to any of the defendants, or land sued for in it, and no one interested as a party to the action objected to such dismissal, we are unable to see upon what principle such dismissal could be held to be a nullity, so long as no attempt was made to retract it. It would not do to permit a plaintiff to place such a dismissal on file and then leave it optional with him to treat it as effective or not. In *James* v. *Center*, 53 Cal. 31, the clerk before the trial, upon the application of the plaintiffs, entered judgment of dismissal. Subsequently, upon the motion of the defendants, the Court made an order vacating the judgment of dismissal, and on appeal from that order, this Court held that that order was erroneous, and reversed it, "because the plaintiffs had a right to dismiss the action in the absence of a counter-claim." The difference between that case and this is, that in that the clerk, without any order, action, or direction of the Court, entered a judgment of dismissal. In this

case the clerk did not enter judgment of dismissal, but there was a stipulation on file upon which the clerk might have entered it without any order, action, or direction of the Court. And if the clerk had done so, the Court could not have vacated the judgment so entered.

In *Lander* v. *Guverneau*, No. 5,260, in this Court, but not reported, a stipulation of dismissal was filed and noted in the clerk's register. A motion was made to vacate it. Among the affidavits used upon the hearing was that of William Harney, who stated that he had been connected with the clerk's office of the City and County of San Francisco for twelve years, and that during that period it had been the usual practice when suits were dismissed by stipulation to note it in the register, "without the entry of a formal judgment of dismissal; the filing of the stipulation of discontinuance, and the noting of the same upon the register, being regarded as a final disposition of the action and as constituting a judgment of dismissal without further action." The motion was denied, and on appeal the order denying the motion was affirmed—upon what ground we cannot, in the absence of any report of the case, positively state.

The practice of the clerk, as stated by Mr. Harney, cannot have much weight in this case, and yet it explains very satisfactorily why no further steps were taken after the stipulation was filed and noted upon the register. Harney's affidavit was made in 1873—seven years after this stipulation was filed. We think that the dismissal by the plaintiff became operative as soon as filed and entered, as aforesaid. If a judgment should have been entered by the clerk, it is one of those cases in which the law will presume that to have been done which should have been done.

Assuming, therefore, that the stipulation was not procured by fraud, or other improper means—and there is no evidence tending to prove that it was—this question arises: Can the plaintiff who obtained a judgment in violation of his written stipulation on file in the action, be restrained by the Court in which the judgment was obtained from enforcing it?

In *Rousset* v. *Boyle*, 45 Cal. 54, the question was—whether a party who had obtained judgment for the exact quantity of land which he claimed in his complaint, but for much more than he

claimed on the trial, should be permitted to retain what he had thus recovered. To our comprehension, the questions in that case and in this are essentially the same. There was something in each case which showed indisputably that the plaintiff had recovered more than he claimed. In that case it appeared by affidavits, which were in no way controverted, that the plaintiff on the trial based his claim to recover upon a deed by which eight acres only were conveyed to him. The Court held that he should not retain more than he claimed on the trial, although he had not recovered more than he claimed in his complaint. Did not the plaintiff in the case at bar, by his stipulation, limit his claim to a recovery of so much of the premises described in his complaint as lay outside of said blocks 22 and 23? Does not the stipulation in this case establish that the plaintiff did not claim block 23 as clearly as the deed introduced on the trial of *Rousset* v. *Boyle* did that the plaintiff claimed only eight acres? To recover more than a party proved himself entitled to, is very different from recovering more than he claimed. In the one case the party aggrieved must resort to his motion for a new trial; in the other, the Court may grant relief as it did in *Rousset* v. *Boyle* and in the case at bar. Of course the fact that the party claimed less than he recovered, must be made clear beyond any doubt by something which, if it had been brought to the attention of the Court at any time before judgment, would have caused a different judgment to be entered. We can conceive of nothing that would establish more satisfactorily what a party did not claim, than his written stipulation on file. It certainly strikes us that such a stipulation would be quite as conclusive on that point, as the deed introduced in *Rousset* v. *Boyle*.

It is urged, however, on behalf of the plaintiff, that the stipulation should be disregarded, because, after it was filed and until an attempt was made to execute the writ of possession, the parties directly interested in it proceeded in apparent ignorance of its existence. That circumstance, if wholly unexplained, might be entitled to more weight than we, in view of the evidence before us, feel called upon to give to it. John N. Risdon in his affidavit states that he verily believes that he and the plaintiff procured the stipulation from Mr. Sloan, and that he, Risdon, procured it to be filed. He also states that his reason

for obtaining it was that he and his partner were desirous of procuring Corcoran's title to block 22, and that in exchange for it they offered to give Corcoran their interest in block 23, which he declined to accept unless they got it released from this suit. The affidavit of Corcoran corroborates that of Risdon as to the motive for obtaining the dismissal of the action as to block 23, and further states that the exchange of interests referred to in Risdon's affidavit was thereafter effected by an interchange of conveyances. The plaintiff in one of his affidavits says: "As to the stipulation of March 17th, 1866, I know nothing about it." In a later one he says: "I have no recollection of procuring the said stipulation from Sloan and Provines, or that Mr. Sloan signed the same in the office of Mr. Minturn, or ever being in that office with Mr. Sloan or Mr. Risdon for any purpose whatever, and I do not believe any such thing ever took place." In neither of his affidavits does he state at what time he first became aware of the existence of the stipulation. His recollection as to his being present with Risdon at Minturn's office when Mr. Sloan signed the stipulation does not accord with that of Risdon.

If the plaintiff did not become aware of the existence of the stipulation until it was brought to light in the proceedings which resulted in the orders appealed from, there is no evidence that any person except Risdon had ever seen it before that time; and if, as does not seem improbable, Risdon was, after the death of Mr. Sloan, the only person who had actual knowledge of the contents of the stipulation, that circumstance, in connection with the fact that the action as to Corcoran was dismissed soon after the filing of it, may account for its being lost sight of. Risdon's interests, after his negotiations with the plaintiff and Corcoran, were all concentrated in block 22, for which he had the plaintiff's and Corcoran's deeds, and therefore was not in any way interested in the stipulation or action after that. The fact that the summons in the action was not served upon Corcoran and Fitzpatrick, who claimed most of block 23, is of some significance in this connection. The omission to serve them may have been in consequence of the dismissal as to that block. And we cannot overlook the fact that between the date of the commencement of the action and that of the issuance of the

writ of possession, a period of nearly fifteen years elapsed, dur- which some persons connected with the litigation died. There may be those living who knew of the stipulation when it was filed, and forgot all about it before the trial of this action. But in any event, it was properly signed, filed, and entered, and when brought to the attention of the Court, was entitled, we think, to the consideration which it received. It was not liable, like a demand, to become stale from the lapse of time. No statute of limitations runs upon such stipulations.

If the efficacy of the stipulation had depended upon the plaintiff's having assented to it, or given special authority to his attorney to enter into it, the aspect of the case might be different. But the general authority of the attorney was sufficient. This is very clearly illustrated in *Gaillard* v. *Smart*, 6 Cowen, 383.

Independently of the stipulation, the defendant Corcoran, and Judson, the successor in interest of the defendant Fitzpatrick, are entitled to the stay which has been granted. The affidavits tend to prove that Corcoran and Fitzpatrick were in possession of block 23 before and at the time of the commencement of this action. That, coupled with the fact that the action was dismissed as to them, justified the Court in granting the stay as to them.

The proceeding by motion based upon affidavits, instead of by action to obtain the relief sought in this case, was sustained in *Rousset* v. *Boyle*, and we are as yet unable to discover any sufficient reason for overruling that case.

The orders appealed from are affirmed.

Morrison, C. J., and Myrick, J., concurred.

McKinstry, J.: I concur in the judgment.

Ross, J.:

I concur in the judgment and in the opinion of Mr. Justice Sharpstein, except in that part of the latter where he speaks of the case of *Rousset* v. *Boyle*, 45 Cal. 64.

[In Bank.—No. 6,397.]

BROCK *v.* MARTINOVICH ET AL.

FICTITIOUS NAME — SERVICE OF AMENDED COMPLAINT — JUDGMENT BY DEFAULT—PRACTICE.—Where a complaint is amended (under § 474 of the Code of Civil Procedure) by inserting the true name of a defendant, sued by a fictitious name, service of a copy of the amended complaint on such defendant is not required, nor is he entitled to ten days in which to answer. Section 472 of the Code of Civil Procedure has no application to such a case.

APPEAL from a judgment for the plaintiff, in the Twenty-third District Court, City and County of San Francisco. THORNTON, J.

The facts are stated in the opinion.

A. D. Splivalo, for Appellant.

J. M. Wood, for Respondent.

THE COURT:

The defendant Splivalo was sued by the fictitious name of John Doe. Both he and his codefendant were regularly served with process, and both failed to appear in the cause. The default of each was duly entered, and afterward, the case coming on regularly to be heard, the plaintiff's attorney asked and obtained leave of the Court to insert in the complaint the true name of Splivalo in lieu of the fictitious name by which he was sued; and thereupon, the Court, after hearing the necessary proof, gave judgment in accordance with the prayer of the complaint.

Splivalo appeals from the judgment, claiming that he was entitled to service of the complaint after his true name had been inserted, and to ten days thereafter within which to answer. No authority has been cited in support of his position, except § 472 of the Code of Civil Procedure, which, we think, has no application here. There is no merit in the appeal.

Judgment affirmed.

MCKEE, J., dissented.

[No. 7,225—In Bank.]

THE PEOPLE *v.* ASHBURNER.

YOSEMITE VALLEY GRANT—TRUST—CHARITY—JURISDICTION.—By the act of Congress of June 30th, 1864, the United States granted the Yosemite Valley to the State of California, and in accepting the grant the State assumed certain obligations in the nature of a trust; but the act and the statute of the State accepting the grant did not operate as a gift for charitable uses, such as may be regulated, directed, and enforced by a Court of Equity; nor can the obligations of the State be enforced by the courts of the State.

ID.—COMMISSIONERS—OFFICER—DEFINITION—TERMS OF OFFICE.—The commissioners to manage the Yosemite Valley, and the Mariposa Big Tree Grove, are mere agents of the State, and persons thus clothed with functions affecting the public, assigned to them by State laws, are *officers* of the State, and their terms of office expired four years after their appointment.

ID.—CONSTITUTIONAL LAW.—The Act of April 15th, 1880, "for the management of the Yosemite Valley, and the Mariposa Big Tree Grove," is not unconstitutional.

APPEAL from a judgment for the defendant, in the Superior Court of the County of Sacramento. DENSON, J.

The *Attorney-General*, for Appellant.

Rhodes & Barstow, for Respondent.

The Act of Congress of June 30th, 1864, (13 Stat. at Large, 1863–4, p. 325) together with the statute of the State accepting the grant, (Stat. 1865–6, p. 710) created a charity. (*Girard Will Case*, *Vidal* v. *Girard's Executors*, 2 How. 127; *Price* v. *Maxwell*, 28 Pa. St. 23; *Jones* v. *Williams*, Amb. 651; Boyle on Charities, 51; *McDonogh* v. *Murdoch*, 15 How. 367; *Mitford* v. *Reynolds*, 1 Phill. (Eng.) 185; Perry on Trusts, §§ 707, 30.) The State may be a trustee. (Perry on Trusts, §§ 40–1; *Mitford* v. *Reynolds*, cited *supra;* Hill on Trustees, 52; *Webb* v. *Neale*, 5 Allen, 575; *Coggeshall* v. *Pelton*, 7 Johns. Ch. 292; *Att'y-Gen.* v. *Clark*, Amb. 422; Boyle on Charities, 52–54; *McDonogh* v. *Murdoch*, cited *supra.*) The commissioners appointed under the act of Congress are not officers, but trustees. (*Inglis* v. *Trustees of Sailors' Snug Harbor*, 3 Peters, 99; *Nightingale* v. *Colbourne*, 2 Phila. 294; *New* v. *Bonaker*, Law Rep. 4 Eq. Cas. Abr. 655; *McDonogh* v. *Murdoch*, cited *supra.*) The commissioners are none the less

trustees because the title was not vested in them. (Perry on Trusts, § 308; *Osgood* v. *Franklin*, 2 Johns. Ch. 1.) The commissioners as trustees are subject to the control of the Court of Equity. (Boyle on Charities, 12–14.)

The Legislature had no power to fix the period during which the commissioners should act as such. (*Yosemite Valley Case*, 15 Wall. 94.) If the commissioners are in any sense officers, they are Federal and not State officers. (*Matter of Ramsden*, 13 How. Pr. 429; *People* v. *Sweetman*, 3 Parker Cr. R. 358.)

McKINSTRY, J.:

The complaint charges the defendant with having usurped the office of member of the Board of "Commissioners to manage the Yosemite Valley, and the Mariposa Big Tree Grove." The answer is a general denial.

The case was submitted upon the agreed statement following:

"I. Under and in pursuance of the act of Congress, entitled "An Act authorizing a grant to the State of California of the Yosemite Valley, and the land embracing the Mariposa Big Tree Grove," approved June 30th, 1864; and also an act of the Legislature of said State, entitled "An Act to accept the grant by the United States Government to the State of California, of the Yosemite Valley and Big Tree Grove, and to organize the Board of Commissioners, and to fully empower them to carry out the objects of the grant, and fulfill the purposes of the trust," approved April 2nd, 1866, Frederick F. Low, the Governor of said State, appointed as the commissioners provided for in said acts: Frederick Law Olmstead, Prof. J. D. Whitney, William Ashburner, I. W. Raymond, E. S. Holden, Alexander Deering, George W. Coulter, and Galen Clark.

II.—Certain of the persons so appointed as commissioners as aforesaid ceased to be or act as such commissioners by reason of their death or resignation, and other persons were duly appointed by the Governor to fill the places so becoming vacant: the persons appointed severally accepted such appointments, and at the time of the passage of the act of the Legislature of this State, entitled, "An Act to provide for the management of the

Yosemite Valley and the Mariposa Big Tree Grove," approved April 15th, 1880, William Ashburner, I. W. Raymond, E. S. Holden, Galen Clark, Edgar Mills, Thomas Madden, Wm. H. Priest, and H. W. Cleveland, were, together with the Governor of said State, acting as such commissioners.

III.—They and each of them had been duly appointed as such commissioners by the Governor of this State, by virtue of the authority conferred upon him by the said act of Congress and said act of the Legislature of this State, first above mentioned.

IV.—Heretofore, to wit: on the 16th day of April, 1880, after the adoption of "Senate Concurrent Resolution, No. 20, relating to appointment of eight commissioners to manage the Yosemite Valley and the Mariposa Big Tree Grove," adopted February 17th, 1880; and the passage of the act of the Legislature of this State, entitled, "An Act to provide for the management of the Yosemite Valley and the Mariposa Big Tree Grove," approved April 15th, 1880, the Governor of said State, in pursuance of said Senate concurrent resolution, and of said act, and by virtue of the authority therein and thereby conferred upon him, appointed I. W. Raymond, J. P. Jackson, M. C. Briggs, William H. Mills, George H. Ladd, W. C. Priest, A. J. Meany, and James L. Sperry, as such commissioners; and each of them accepted such appointment, and took, subscribed and filed an oath of office, in the manner and form prescribed by law for the officers of the government of said State.

V.—More than four years had elapsed after the appointment by the Governor of each of the persons mentioned in the first and second paragraphs above written, and before the passage of said act of the Legislature, passed April 15th, 1880.

Neither the said defendant, nor any one of the said persons last aforesaid, had been reappointed as such commissioner, after their respective appointments as aforesaid.

Each of the said commissioners so appointed on the 19th day of April, 1880, and the board composed of said commissioners, duly demanded of said William Ashburner that he surrender said office and cease to discharge the duties thereof; but the said Ashburner refused, and still refuses, to comply with such demand—the said demand having been made after the qualifica-

tion of said commissioners, and before the commencement of this action.

VI.—Said defendant has, ever since the passage of the said act last aforesaid, continued to discharge the duties of such commissioner as first aforesaid, and has during all that time claimed, and still claims, that he is by law entitled to be such commissioner, and to be a member of said Board of Commissioners as organized and existing at the time of the passage of said last mentioned act, and to exercise and discharge all the powers, authority, and duties of such commissioner, and of a member of such Board of Commissioners; he claiming and insisting that said Board of Commissioners and the members thereof continue to be and are such board, and the members thereof, notwithstanding the passage of said act, approved April 15th, 1880, and the alleged appointment by the Governor of the members of the Board of Commissioners on the 19th day of April, 1880, as mentioned in the fourth paragraph hereof.

The Act of Congress of June 30th, 1864 (13 U. S. Stats. at Large, 1863–4, p. 325), provides: "There shall be, and *is hereby granted to the State of California* the cleft or gorge in the granite peak of the Sierra Nevada Mountains, situated in the County of Mariposa, in the State aforesaid, and the headwaters of the Merced River, and known as the Yosemite Valley, with its branches," etc., "with the *stipulation*, nevertheless, *that the said State shall accept this grant with the express conditions* that the premises shall be held for *public use, resort and recreation*, shall be inalienable for all time, but leases not exceeding ten years may be granted for portions of said premises. All incomes to be derived from leases of privileges to be expended in the preservation and improvement of the property or the roads leading thereto. * * * * * The premises to be managed by the Governor of the State, with eight other commissioners, to be appointed by the executive of California, who shall receive no compensation for their services."

It will be observed that by the terms of the act of Congress the grant *to the State of California* was to take effect when the State should *accept*, with certain conditions: "With the *stipulation*, nevertheless, that the said State *shall accept this grant with the express conditions*," etc. When the act of Congress was

passed, there was no perfected agreement with the State; the act was a proffer to the State, and was to operate a grant, provided the State should join in the stipulation that certain conditions—in the nature of conditions subsequent—should be by it assumed. It is not necessary to inquire whether by any legal proceeding, based upon a forfeiture, the land could be recovered by the Federal Government in case the State should fail to comply with the obligations by it assumed with reference to the subject of the grant, or whether the Yosemite Valley passed forever to the State, in reliance upon the pledged honor of the State that it should be preserved, dedicated, and managed as contemplated by the act of Congress. No provision of the act of the California Legislature of April 15th, 1880, has been called to our attention as being in itself a violation of any one of the conditions named in the act of Congress, or of any part of the stipulation entered into by the State.

By the first section of the Act of April 2nd, 1866, (Stat. of California, 1865–6, p. 710) the Legislature *accepted* the grant for the State "upon the conditions, reservations, and stipulations contained in said act of Congress," and thereby became bound to carry into effect the stipulation which it had entered into, and which the act of Congress had required should be entered into, as a condition to the grant becoming operative. By accepting the grant upon the stipulations contained in the act of Congress, the State assumed the duty of providing, by appropriate legislation, 1st, for inalienably preserving the premises for public use, resort, and recreation; 2nd, prohibiting leases of any portion for a longer term than ten years; 3rd, for the application of all "incomes" to the preservation or improvement of the property or roads leading thereto; 4th, authorizing the Governor to appoint eight commissioners, who, with himself, shall, without compensation, "manage" the premises.

The fact that the Legislature, on the 2nd of April, 1866, discharged its duty (by legislation with reference to the several subjects, with respect to which legislation was pledged by the acceptance of the grant) *in the same act* as that which contained the acceptance, does not affect the question we are considering.

The grant was accepted, upon the conditions, etc., and the

rest of the act may be treated as if it were a separate and subsequent law—a law which may be changed as often as the representatives of the people of the State may deem it proper; provided the stipulation or pledge of the State, given when the grant was accepted, is not violated.

There can be no doubt that, by accepting the grant, the State assumed certain obligations in the *nature* of a trust, which it would be a violation of good faith to disregard. We know of no way by which these obligations can be enforced in a State court; but, however this may be, we are quite certain that as yet no violation of the duties imposed upon the State by her acceptance of the grant has occurred.

It is urged by counsel for respondent that the act of Congress and the statute of the State created a "charity." In a larger sense, this is true, since the legislation, national and State, while placing the legal title in the State, was intended to operate as a gift to the general public use, free from "the taint of every consideration, personal, private, and selfish." But when we inquire whether the result is a *gift for charitable uses*, such as may be *regulated, directed, and enforced by a Court of Equity*, we are met by insurmountable obstacles to the conclusion that the matter is within any branch of equitable jurisdiction of which this Court can take cognizance. It is a dedication to the public, brought about by the combined action of the Federal and State Governments. The State is the trustee—if there be a trustee—but a trustee whom this Court has no power to remove. We cannot enforce any decree with respect to the mode or manner in which the State shall discharge the duties it has assumed. (Hill on Trustees, 49; Perry on Trusts, 40, 41.) The commissioners are mere agents of the State, who bear no relation (other than that borne by other citizens) to the Government of the United States, but whose duties are defined, whose powers exercised, under and by virtue of State laws alone. Persons thus clothed with functions affecting the public, assigned to them by State laws, are *officers* of the State. (*Bradford* v. *Justices' Court*, 33 Ga. 332; *Leach* v. *Cassidy*, 23 Ind. 449; *Waldo* v. *Wallace*, 12 id. 569; *Smith* v. *Mayor etc.* 37 N. Y. 518.)

The nature of the title created by the Federal and State leg-

islation must depend simply upon the act of Congress and the State statute. Upon a reference to them, we can discover but a distant analogy between the present and the cases cited in the able and ingenious brief of counsel for respondent.

In *Price* v. *Maxwell*, 28 Pa. St. 23, it was held that a devise to a *school*, where both rich and poor were taught, and religious was combined with literary and scientific instruction, was for charitable uses. *Jones* v. *Williams*, Amb. 651, was a bequest of money to be applied to the purchase of water-works for the inhabitants of a town. Held, a charitable use, void by the statute of mortmain. *McDonogh* v. *Murdoch*, 15 How. 367, determined the validity of legacies, for charities, to the cities of Baltimore and New Orleans; and held, *inter alia*, that the cities were authorized to take by the laws of Maryland and Louisiana. In *Mitford* v. *Reynolds*, 1 Phill. Ch. 105, it seems to have been assumed that a devise to the "Government of Bengal" was a devise to the Governor-General as an individual. In *Attorney-General* v. *Heelis*, 2 Sim. & Stu. 67, it was said that a fund derived wholly from assessments under an act of Parliament, and not at all from bounty, was not a charitable fund to be administered by a Court of Equity. *Webb* v. *Neale*, 5 Allen, 575, and *Coggeshall* v. *Pelton*, 7 Johns. Ch. 292, decide that certain cities were competent to be trustees. In *Inglis* v. *Trustees of Sailors' Snug Harbor*, 3 Peters, 99, it was held that a bequest to the Chancellor of the State of New York was equivalent to a designation of that officer by his proper name, and the trust was to be executed by him in his individual character. In *Nightingale* v. *Goulbourne*, 2 Phill. Ch. 594, that a bequest to the Chancellor of Exchequer was a bequest to the holder of the office.

It may be admitted that one may sometimes be charged as trustee who is clothed with a power with reference to real estate, although the legal title may not be vested in him. It is very possible that, in a proceeding brought by the State, the Yosemite commissioners might be compelled to an accounting, etc., in case of misappropriation of funds. But this would not make them any the less officers, nor could it affect the question of the power of the Legislature to provide for their removal and the appointment of other persons in their stead. The stat-

ute of April 15th, 1880, like that of April 2nd, 1866, provides for eight commissioners to be appointed by the Governor, who, with that officer, are required to *manage* the property in accordance with the stipulation entered into by the State when the grant was accepted. Inasmuch as the commissioners originally appointed were officers, their term of office expired four years after their appointment. (Const. of 1849, art. x, § 7; Const. of 1879, art. xx, § 16.)

Judgment reversed and cause remanded, with directions that the Court below enter judgment as prayed for in the complaint.

SHARPSTEIN, J., MYRICK, J., and MCKEE, J., concurred.

THORNTON, J., dissented.

[No. 10,528.—Department No. 1.]

THE PEOPLE *v.* ST. CLAIR.

INDICTMENT — LARCENY — BURGLARY. — An indictment, charging an entry into a stable, with intent to commit "larcey," does not describe any offense.

APPEAL from a judgment of conviction, and from an order denying a new trial, in the Superior Court of the County of San Joaquin. BUCKLEY, J.

G. E. McStay, and *J. G. Swinnerton*, for Appellant.

There is no offense charged in the indictment. (Pen. Code, § 950; *State* v. *Halder*, 2 McCord, 377; *State* v. *Carter*, Conf. Rep. 210; S. C. 2 Hayw.; *Lemons* v. *The State*, 6 Am. R. 293; *Shaw* v. *The State*, 2 Tex. Ct. App. 487; *Haney* v. *The State*, id. 504.)

The *Attorney-General*, for Respondent.

Verbal or grammatical inaccuracies, which do not affect the sense, are not fatal. (1 Whart. Cr. Law, §§ 405–9, 597–8, 606; *State* v. *Davis*, 1 Ired. 125.)

The COURT:

The indictment charges an entry into a stable with intent to commit "larcey." Burglary is the entering of a house, etc., "with intent to commit grand or petit larceny, or any felony." (Pen. Code, § 459.) There is no such felony as "larcey" known to our law. "Larcey" is certainly not larceny, nor does the maxim *idem sonans* apply.

It is said that the Court must give judgment without regard to the technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. (Pen. Code, 1258.) But this is more than a departure from an established form; nor is it a case in which facts are averred in the indictment which sufficiently indicate the sense in which the word purporting to *name the crime* is employed, but is a failure to describe any offense.

Judgment reversed, and cause remanded for a new trial.

[No. 6,299.—In Bank.]

HASSEY *v.* WILKE.

FORECLOSURE SALE—PRINCIPAL AND SURETY—CONSTRUCTIVE TRUST—CONSTRUCTIVE NOTICE.—The plaintiff, to secure the note of her husband, (given for his own indebtedness) executed, jointly with him, a mortgage upon land previously conveyed to her by him, by deed of gift duly recorded; and, upon the foreclosure of the mortgage, the land was purchased by one B., for the husband, and with his money, and was by B. conveyed to him. Afterward, the husband, to secure an antecedent indebtedness, conveyed to the defendant, who took without actual notice of the premises. *Held*, 1st, that the husband, in purchasing the property through B. at the foreclosure sale, was but paying his own debt, and, therefore, took the title in trust for the plaintiff; and 2nd, that the records were sufficient to put the defendant upon inquiry, and he was bound at his peril to inform himself as to the facts; and of what he therefore took, subject to the trust.

ID.—ID.—ID.—ID.—MCKEE, J., dissenting, was of the opinion that the defendant took without actual or constructive notice that B. held the title in secret trust for the husband, or that the latter held it for his wife.

APPEAL from a judgment for the defendant, in the Nineteenth District Court, City and County of San Francisco. WHEELER, J.

J. R. Sharpstein, and *McAllister & Bergin*, for Appellant.

By purchase of the property at the foreclosure sale, Hassey simply paid his own debt, and took the land in trust for his wife. (*Fitch* v. *Cotheal*, 2 Sand. Ch. 29.) The defendant purchased with notice of the trust. The plaintiff's title was evidenced by a deed of gift to her on record; and the foreclosure proceedings disclosed the fact that the property was mortgaged to secure the debt of F. A. Hassey. The fact that the purchaser had no actual notice from the record, does not rebut the fact of notice. (Civ. Code, § 1213; 1 Perry on Trusts, § 223; *Ramsdell* v. *Fuller*, 28 Cal. 37; 1 Story's Eq. Jur. §§ 400–3.)

Joseph Napthaly, and *John Hunt, Jr.*, for Respondent.

In this case, there were no circumstances which could or ought to have excited inquiry upon respondent's part. The Registry Act never operated as constructive notice, save of the facts which appear upon the face of the record. (*Chamberlain* v. *Bell*, 7 Cal. 292; Willard's Eq. 256.)

There was nothing in the records to affect the defendant with notice that Burling purchased for Halsey, or that the money was furnished by the latter; or that a resulting trust existed in his favor.

Ross, J.:

By this action, the plaintiff seeks to have the defendant Wilke decreed a trustee for her in respect to certain real property, and to compel a conveyance of it to her. There is no dispute about the facts, which, as admitted by the pleadings, are as follows: On the 10th of August, 1868, plaintiff and one F. A. Hassey were husband and wife. On that day, F. A. Hassey conveyed to plaintiff by deed of gift, in consideration of his love and affection for her, and for her better support, the block of land in question in this action. The deed was duly recorded in the office of the County Recorder of the City and County of San Francisco, on the 11th of August, 1868, in which city and county the land is situated. On the 20th of September, 1869, F. A. Hassey borrowed of Nicholas Luning $10,000, and executed

his promissory note therefor, to secure the payment of which the plaintiff, at the request of her husband (he joining her) executed to Luning a mortgage upon her said property. This mortgage was duly recorded on the 20th of September, 1869. The note not having been paid, Luning, on the 29th of September, 1873, commenced an action in the Nineteenth District Court to foreclose the mortgage, and on the 29th of January, 1875, a decree of foreclosure was duly entered in the action. Under this decree, the property was sold on the 12th of March, 1875, to one Burling, for the sum of $13,721.43. Burling made the purchase for F. A. Hassey, the purchase-money having been furnished by Hassey. No redemption having taken place, the Sheriff, on the 26th of October, 1875, executed to Burling a deed conveying the property to him. On the next day, that is to say, on the 27th of October, 1875, Burling executed to F. A. Hassey a deed to the property. This deed was recorded January 18th, 1876.

In August, 1872, and prior to the commencement of the foreclosure proceedings, the plaintiff, with the consent of her husband, went to Europe, and did not return to California till the 5th day of June, 1877.

On the 10th day of May, 1877, F. A. Hassey was indebted to the defendant Wilke in a large sum of money by reason of certain dealings in stocks, and on that day, and in consideration of such indebtedness, executed to Wilke a deed for the property, which deed was recorded June 6th, 1877.

In speaking of the transaction, the defendant Wilke testified: "I took it (the deed) merely to secure old debts, which were getting bigger and bigger every day; the stock declined day after day." And again: "I had to take the conveyance on a minute's notice, merely to secure myself. I don't think there was one day difference when I told Mr. Hassey to give me some security for the debt standing on my books. He told me he had nothing, but he would transfer this piece of property. He had the title drawn off, or the deed drawn off, acknowledged, and brought it over to the office, and I had no time even to make a search of the title. It might have been of some value, or it might have been entirely valueless. I had no time to examine it. It was just taken for whatever it was worth, to cancel part

of the indebtedness. I have not even now searched the title or abstract, or anything of the kind." In response to a question as to what the understanding was with Hassey at the time of the execution of the deed, the defendant answered as follows:

"I told him as soon as he pays his indebtedness he might have the property back; and I am willing to give it up, and wish he would pay it."

At the time Wilke took the deed from Hassey, he (Wilke) had no actual knowledge of the fact that the land was the separate property of *Mrs.* Hassey.

1. It is clear that the plaintiff, in mortgaging her separate property to secure the payment of her husband's debt to Luning, became, as between herself and husband, a surety only. *Spear* v. *Ward*, 20 Cal. 660; *Loomer* v. *Wheelwright*, 3 Sand. Ch. 135; *The Bank of Albion* v. *Burns*, 46 N. Y. 170; 1 Bishop on Married Women, 604.) And it is equally clear that the husband, in purchasing the property through Burling, at the foreclosure sale, was but paying his own debt; and that he took, and thereafter held, the title to the property in trust for plaintiff. (*Fitch* v. *Cotheal*, 2 Sand. Ch. 29.)

2. Did the trust follow the property into the hands of the defendant, Wilke? In 1 Story's Eq. Jurisprudence, § 403, it is said: "In America it is uniformly held that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property." And by § 1213 of our Civil Code, it is provided that "every conveyance of real property, acknowledged or proved, and certified and recorded as prescribed by law, from the time it is filed with the Recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees." The term "conveyance" as used in this section embraces mortgages. (Civ. Code, § 1215.)

Wilke must, therefore, be held to have known that the property in question was conveyed as a gift by Hassey to his wife in 1868, and that it thereupon became her separate property, and that on the 20th of September, 1869, Mrs. Hassey mortgaged this, her separate property, to Luning, to secure the individual note of her husband. The note was the principal obligation—the mortgage merely a security. Assuming, as most

favorable for defendant, that upon these facts no presumption arises that the money advanced by Luning was for the benefit of the husband, still the most that can be claimed for him is that the record upon its face was equivocal. In that view, according to the record the money might have been (as it was in fact) advanced for the benefit of the husband, and the wife's property might have been (as it was in fact) merely security for his debt. The record was, at least, sufficient to put Wilke upon inquiry, and he was bound, at his peril, to inform himself as to the facts. (*Ramsdell* v. *Fuller*, 28 Cal. 37; *Nelson* v. *Allen*, 1 Yerg. (Tenn.) 360; *Bank of Albion* v. *Burns*, 46 N. Y. 170.)

Fortunately, however, in protecting the plaintiff's equities, it does not seem that the defendant is placed in any worse position than he would have occupied had the property never been conveyed to him, for it does not appear that he gave up or relinquished anything on the faith of the conveyance; but, on the contrary, it seems from his own testimony that the transfer was accepted by him, not in absolute payment or satisfaction of the debt due to him from F. A. Hassey, but rather as doubtful security for the antecedent indebtedness, which might or might not be of some avail.

It results that the judgment of the Court below must be reversed and cause remanded to the Court below for a new trial.

So ordered.

MORRISON, C. J., MCKINSTRY, J., MYRICK, J., and THORNTON, J., concurred.

[SHARPSTEIN, J., being disqualified, did not sit in the case.]

MCKEE, J., dissenting:

The property in dispute in the case of *Ramsdell* v. *Fuller*, referred to in the opinion of Mr. Justice ROSS, was conveyed during coverture to the wife for a money consideration. Presumptively the property thus acquired by the wife was common property. But that presumption was liable to be rebutted by proof that the money which was paid for the property constituted the separate fund of the wife; and that fact being proven, it was

held by the Court that the wife was entitled to a decree setting aside, as a cloud upon her title, a mortgage upon the property which had been executed by the husband alone, upon the ground that the record of title in the case was notice to the mortgagee and all the world, that the land in dispute might be the separate property of the wife, and every party dealing with it did so at his peril. "The plaintiff," said the Court, "was, by record, put upon inquiry as to the true condition of the title." But the case in hand is not that case.

It is true, that the defendant in this case had constructive notice that the title, which he acquired to the land in dispute, had at one time belonged to the plaintiff in the action as her separate property; but the record and judicial proceedings which imparted to him that notice, also showed that she had, jointly with her husband, mortgaged it to one Nicholas Luning; that the mortgage had been, by judicial proceedings against her and her husband, foreclosed; and that her title had passed by sheriff's deed under decree of foreclosure to Burling, the purchaser, at the foreclosure sale. The deed which Burling obtained at this compulsory sale was as effectual in vesting in him the title of the plaintiff to the land, as though he had purchased it directly from her; and this title passed by deed from Burling to Hassey; and by deed from Hassey to the defendant, who took it without actual or constructive notice that Burling held the title in secret trust for Hassey, or that Hassey held it for his wife.

I, therefore, respectfully dissent from the judgment of my associates. I think the order of the Court below should be affirmed.

[No. 6,298.—In Bank.]

ELDRIDGE *v.* WRIGHT.

REDEMPTION — TENANTS IN COMMON. — Where land sold under judgment is embraced in one sale, a redemptioner, having a lien upon a share or part of the land sold, can only redeem by paying the whole of the purchase-money and redeeming the whole of the land; and in such case, he succeeds to the whole interest of the purchaser. Accordingly, where land was sold under a judgment of foreclosure against tenants in common, and redeemed by a judgment creditor of one of the tenants, who in due course received his deed: *Held*, that the redemptioner took the interests of both tenants.

ID.—ID.—SHARPSTEIN, J., concurring in the judgment, doubted whether the redemptioner had a right to redeem a greater interest in the property sold than that of his judgment debtor; but was of the opinion, as the purchaser did not object to his redeeming the whole property, that the effect of the transaction was to vest in him the whole interest of the purchaser.

ID.—ID.—LIEN.—MYRICK, J., dissenting, was of opinion that the redemptioner was subrogated to the rights of his judgment debtor, and thus became the owner of the legal title formerly held by him; and, as to the other tenant, that he acquired an equitable lien upon his interest as security for one-half of the redemption money.

ID.—ID.—CASES EXPLAINED — EQUITABLE REDEMPTION— STATUTORY REDEMPTION.—*Kirkman* v. *Dupont*, 14 Cal., was not a case of statutory redemption, but of redemption by junior mortgagees of the interest of one tenant in common from a sale in a foreclosure suit against the tenants in common to which they were not parties. The difference between the cases is explained in *Whitney* v. *Higgins*, 10 Cal. 554, and *Montgomery* v. *Tutt*, 11 id. 317.

ID.—ID.—ID.—*Erwin* v. *Schriver*, 19 Johns. 379, and *Fischer* v. *Eslamann*, 68 Ill. 78, are on statutes with different provisions from the statute of this State.

APPEAL from a judgment for the plaintiff, in the Fourth District Court, City and County of San Francisco. MORRISON, J.

The facts are stated in the opinion.

Sawyer & Ball, for Appellants.

The right to redeem is statutory, and can only be exercised in accordance with the statute. (Freeman on Executions, § 314; *Haskell* v. *Manlove*, 14 Cal. 54; *Wilcoxen* v. *Miller*, 49 id. 193; *Fischer* v. *Eslamann*, 68 Ill. 78; Code Civ. Proc. § 701.) It could not have been the intention of the statute to give a creditor the right of redemption to any other lands than such as were subject to the *lien* of the judgment creditor. (*Erwin* v. *Schriver*, 19 Johns. 379; *Kirkham* v. *Dupont*, 14 Cal. 559; *Quinn* v. *Kenney*, 47 id. 147; Freeman on Execu-

tions, § 321; Freeman on Coten. etc. § 371; *Fischer* v. *Eslamann*, cited *supra*.)

Taylor & Haight, for Respondent.

Respondent had the right to redeem. (Code Civ. Proc. § 701.) *Erwin* v. *Schriver*, 19 Johns. 379, and the Illinois case cited, were decided under different statutes from ours. *People* v. *Haskins*, 7 Wend. 463, decided under a later statute in New York, is in point, in our favor. At all events, the acceptance by Winter of the money paid by Eldridge ought to be regarded as a transfer by Winter of the right acquired by him.

THORNTON, J.:

Eldridge instituted this action to quiet his title to a parcel of land situate in the City and County of San Francisco.

It appears from the findings of the Court below, that on the 26th of March, 1872, J. D. and W. H. Farwell, who were then owners of undivided moieties of the land in controversy, executed a mortgage thereon to the National Gold Bank and Trust Company; that this company thereafter brought suit to foreclose the mortgage, and obtained a decree, which was recorded on the 29th of January, 1875. At the sale made by virtue of this decree, on the 8th of March, 1875, William Winter purchased the premises, and received from the Sheriff a certificate of sale. The purchase-money paid by Winter was $6,000. On the 6th of September, 1875, Eldridge, as a judgment creditor of J. D. Farwell, redeemed the premises from Winter, paying him the sum required by law, amounting to $6,832. On the 12th of November, 1875, the period of six months from the sale having then elapsed, the Sheriff executed to Eldridge a conveyance of the premises.

It was also found, that on the 5th of November, 1875, (after the expiration of the six months' period above mentioned) Wright purchased of Wm. H. Farwell, for the sum of $800, all of his (Farwell's) interest in the land, on the same day received a conveyance therefor, gave notice to the Sheriff of his

purchase, and forbade his executing any deed to Eldridge of his grantor's (W. H. Farwell's) interest in the premises.

The sole question presented for decision here is, whether Eldridge acquired by the proceedings above stated a title to the land in controversy independent of any right which Wright received under the conveyance to him by W. H. Farwell, and which would entitle him to a judgment quieting his title against Wright.

It is contended on behalf of the defendant, that the judgment under which Eldridge redeemed was docketed on the 23rd of January, 1875, and that the lien of such judgment was not subsequent to that on which the property was sold, and therefore he (Eldridge) was not entitled to redeem. It is true that the judgment recovered in the foreclosure case was not recorded until the 29th of January, 1875, but it does not appear that this judgment was ever docketed; and, therefore, when the sale took place, there was no lien by this judgment. (Code Civ. Proc. §§ 671, 726; *Englund* v. *Lewis*, 25 Cal. 337.) But the lien under which the property was sold was that of the mortgage foreclosed, (Code Civ. Proc. § 901; *Frink* v. *Murphy*, 21 Cal. 108) which dates from the 26th of March, 1872, the day on which the mortgage was executed. The lien of the judgment under which Eldridge redeemed having come into existence long subsequent to this, he was, in our opinion, a redemptioner under the statute.

Eldridge effected a redemption from Winter. What did he redeem? The statute affords the only means of ascertaining this. The right to redeem exists only by virtue of the statute, and under its provisions we must find the measure of the right. (*Tuolumne Redemption Company* v. *Sedgwicks*, 15 Cal. 515.) According to the requirements of the statute upon this subject, "upon a sale of real property, the purchaser is substituted to, and acquires all the right, title, interest, and claim of the judgment debtor thereto." (Code Civ. Proc. § 700.) In all cases other than a sale where "the estate is less than a leasehold of two years' unexpired term," the property sold is subject to redemption, and the officer making the sale is required to give to the purchaser a certificate of sale, containing, among other things, a particular description of the property sold, and a

statement that it is subject to redemption. (Code Civ. Proc. § 700.) The succeeding section of the Code (701) prescribes that "property sold subject to redemption as provided in the preceding section, or any part sold separately, may be redeemed in the manner hereinafter provided."

It is a just inference from the statutory provisions above stated, that when Eldridge redeemed from Winter, he redeemed the whole property sold. The sale by the Sheriff embraced the interests of both J. D. and W. H. Farwell, and was not restricted to the interest of J. D. Farwell. Eldridge redeemed the whole property from the sale made by the Sheriff to Winter, regardless of the interests of the judgment debtors. He had to redeem all or none. As the property sold was embraced in one sale, the law afforded no means by which less than the whole could be redeemed. The redemption was an entirety, and so existed, or did not exist at all.

This conclusion is sustained by the further statutory enactments on the subject. In order to redeem from the purchaser, the redemptioner is required to pay him the amount of his purchase, with twelve per cent thereon in addition, etc., etc. (Code Civ. Proc. § 702.) If the property sold be redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on the last redemption, with four per cent thereon in addition, etc., etc. The property may be again and as often as a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, on paying the sums paid on the last previous redemption, with four per cent thereon in addition, etc., etc. (Code Civ. Proc., § 703.)

It will be seen from these provisions of the statute that not only must the whole property be redeemed, but the payments to be made on redemption always include the whole purchase-money.

As to the conveyance by the Sheriff, it is provided that if a redemption is made, and sixty days have elapsed and no other redemption has been made within that period, and the time for redemption has expired, the last redemptioner or his assignee is entitled to a sheriff's deed. (Code Civ. Proc. § 703.) The

Sheriff must convey the property sold. There is nothing in the statute as regards this conveyance which makes any reference to less than the entire property which the Sheriff has sold, and for which he has made his certificate of sale to the purchaser.

The statute allows the judgment debtor to redeem at any time within the six months, and it may be that his successor in interest has the same right. If the judgment debtor redeems, "the effect of the sale is terminated, and he is restored to his estate." (Code. Civ. Proc. § 703.) Such is not the effect, as is above seen, when the redemption is made by one of the class styled redemptioners. Under the circumstances above pointed out, one of that class is entitled to a conveyance from the Sheriff.

The provisions of § 707 of the Code of Civil Procedure, as to the rents of the property sold, or the value of its use and occupation, also show that the interest of the purchaser, and of the redemptioner from the time of redemption made, extends to the whole property sold.

It is contended on behalf of the defendant that the right of Eldridge to redeem extends no further than the interest of the tenant in common, which is bound by the lien of the judgment under which he (Eldridge) derives the right to make such redemption; that under his judgment against J. D. Farwell, he could, by virtue of an execution issued on it, sell only the interest of J. D. Farwell, and that his right of redemption is limited to the interest which he could subject to sale under execution. What is said above shows this to be an entire misconception of the scope of the statute. The provision of the statute invoked to sustain this view is contained in the second subdivision of § 701. This subdivision, in our judgment, defines the class of persons who have a right to exercise the privilege of redemption. It does not in any way limit or define the extent of the right. Such extent will be found in the other provisions of the statute referred to above.

The contention put forth on behalf of defendant that by reason of the fact that Eldridge, a judgment creditor of J. D. Farwell, a tenant in common with the grantor of defendant, has redeemed the property from the sale to Winter, an equity has resulted to defendant, has nothing to sustain it. If no redemption had been

made, upon the expiration of the period of six months after the sale, the purchaser (Winter) would have been entitled to a conveyance of the property. By the redemption, Eldridge was invested with all the rights of Winter. It is said in *Bagley* v. *Ward*, 37 Cal. 121, that "the redemption is virtually a transfer of the certificate of sale." (As to this, see also *Abadie* v. *Lobero*, 36 Cal. 390.) The equity is novel which has no existence against Winter, but becomes quick with life when Winter's rights have been transferred to another. W. H. Farwell, the grantor of Wright, could have redeemed at any time within the six months' period, either from Winter, the purchaser, or Eldridge, the redemptioner. It may be conceded that Wright, the grantee of W. H. Farwell, had the same right. But when the six months' period had elapsed, neither W. H. Farwell, nor his grantee, Wright, had any such privilege. As we have seen, the conveyance to Wright was not made until the expiration of the six months, and at that time his grantor had nothing to convey which would invest his grantee with the right to redeem. It cannot be maintained that under such circumstances W. H. Farwell had a right to redeem. To hold that Wright had, would be to accord to him a greater right than his assignor had.

We have examined the cases cited by counsel for defendant. They have no application to the case before us. *Kirkham* v. *Dupont*, 14 Cal. 559, is a case of second mortgagees of the interest of one tenant in common seeking to redeem from a prior mortgage made by his mortgagor, in which the other tenant in common joined. There had been a foreclosure by suit of the first mortgage against both tenants in common, to which the second mortgagees were not parties, a sale at which the first mortgagees became the purchasers, and had received the sheriff's deed. The Court held that the second mortgagees could redeem the interest of the tenant in common who had mortgaged to them. This was not a case of statutory redemption. The difference between the redemption right of a mortgagee before decree of foreclosure, and the statutory right to redeem from a judgment, is pointed out in *Whitney* v. *Higgins*, 10 Cal. 547, and *Montgomery* v. *Tutt*, 11 Cal. 307. The cases cited from New York, *Erwin* v. *Schriver*, 19 Johns. 379, and the case from

Illinois, *Fischer* v. *Eslamann*, 68 Ill. 78, are on statutes with different provisions from the statute of this State, and have no application to the question before us, which is to be determined on the construction of the statute of this State, which gives the right of redemption, defines its extent, and limits, regulates, and controls it in all its length and breadth.

We discover no error in the judgment of the Court below, and it is affirmed.

MORRISON, C. J., MCKINSTRY J., MCKEE, J., and ROSS, J., concurred.

SHARPSTEIN, J., concurring:

I concur in the affirmance of the judgment of the Court below, although I am not convinced that the plaintiff, by virtue of his judgment against J. D. Farwell, had a right to redeem any greater interest in the property than J. D. had. But Winter had purchased the entire interest of both of the Farwells, and if he did not object to the plaintiff's redeeming the whole property, I think the effect of the transaction was to vest in the plaintiff whatever right Winter had acquired. The Sheriff, in receiving the money paid by plaintiff, and in the execution of the deed, was acting as the agent of Winter; and he, by receiving the money and acquiescing in the conveyance to the plaintiff, ratified the acts of the Sheriff; so far, at least, as to preclude any stranger to the transaction from attacking it. If Winter had declined to receive more than one-half of the money tendered him, and refused to sanction the conveyance of more than an undivided one-half interest in the property to the plaintiff, on the ground that the plaintiff's lien was limited to that, I am not prepared to say that the plaintiff could have compelled the conveyance of anything beyond that. But Winter had a perfect right to transfer the interest which he had acquired in the whole property to the plaintiff, and to direct the Sheriff to convey it to him, and for anything appearing to the contrary that was done. As I view the case, the plaintiff occupies the same position that Winter would have occupied if he had received a conveyance of the entire property from the Sheriff. Neither Winter nor the plaintiff became a tenant in common of W. H.

Farwell. No relation of trust or confidence is shown to have been established between them. Of course, the Farwells, or either of them, or their successor in interest, or the successors in interest of either of them, might have redeemed the entire property within the statutory period. But I can discover no ground upon which the defendant can now base any claim to any part of the property.

MYRICK, J., dissenting:

This is an action to quiet title. J. D. Farwell and W. H. Farwell were the owners, as tenants in common, of the premises described in the complaint. They mortgaged the premises to the N. G. B. and T. Company to secure the payment of $7,000. Judgment of foreclosure of the mortgage and sale of the premises was made by the proper court. At the sale by the Sheriff, William Winter became the purchaser at $6,000, and received a certificate of sale from the Sheriff. September 6th, 1875, plaintiff gave notice to the Sheriff that he was a judgment creditor of J. D. Farwell; that he had a judgment lien on the property, and intended to redeem the land from the sale, and deposited $6,832 with the Sheriff, which was accepted by Winter. November 5th, 1875, W. H. Farwell executed to defendant a deed, in consideration of $800, conveying all his right, title, and interest in the premises. Defendant gave notice to the Sheriff of his purchase, and forbade the Sheriff from executing a deed to plaintiff of W. H. Farwell's interest in said land. After the receipt of the notice, the Sheriff, November 12th, 1875, executed to plaintiff a deed purporting to convey to plaintiff the premises, embracing the title and interest of J. D. Farwell and W. H. Farwell.

Plaintiff then commenced this action to quiet his title to the premises. Defendant answered, alleging that he was the owner of an undivided one-half of said property as a tenant in common. He also set forth the facts above stated, and asked that his interest in the premises be determined. Plaintiff demurred to that part of the answer. The Court sustained the demurrer. The cause was tried, and judgment rendered for the plaintiff.

From the foregoing statement, it appears that property,

owned by J. D. and W. H. Farwell as tenants in common, was sold at sheriff's sale to satisfy their mortgage, Winter being the purchaser; that plaintiff, being a judgment creditor of J. D. Farwell, redeemed the property from the sale, and received the sheriff's deed as redemptioner; and now claims to own the entire property by virtue of that redemption and deed; that defendant is the successor in interest of W. H. Farwell, subject to the mortgage and the sale thereon, and claims to own the undivided one-half of the premises, subject to whatever rights may have accrued under the foreclosure and sale. If the interest theretofore owned by W. H. Farwell, purchased by Winter at the sale, passed to plaintiff upon the redemption, defendant has no interest in the property, and plaintiff was entitled to a decree. If, however, plaintiff, notwithstanding the sale to Winter, acquired by his redemption only the interest or title of J. D. Farwell, and an equitable lien on the other half as security for one-half the amount paid on the redemption, defendant has some interest in the property.

Upon a sale of real property, the purchaser is substituted to, and acquires all the right, title, interest, and claim, of the judgment debtor thereto. (Code Civ. Proc. § 700.) Winter, therefore, was substituted to, and acquired all the right, title, interest, and claim, of J. D. Farwell and W. H. Farwell, in and to the premises. Property sold subject to redemption may be redeemed by the following persons or their successors in interest: First, the judgment debtor, or his successor in interest in the whole or any part of the property. Second, a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. (Code Civ. Proc. § 701.) The persons mentioned in the second clause are termed redemptioners.

The two Farwells, therefore, or the successor in interest of the two, could have redeemed. The statute is silent as to any direct provision that one of two or more judgment debtors, or the successor in interest of one of two or more debtors, may redeem, but all the cases that have come under observation take it for granted that such action can be had. The words "or his successor in interest in the whole *or any part of the property*," would seem to imply that the successor must be a successor as

to some particular parcel rather than as to an undivided interest; yet it has been held, under similar words, that *any part of the property* will include an undivided interest. In the second subdivision above referred to, the words "or on some share" are used in addition to the words "or part thereof," which clearly authorize the creditor of one tenant in common to redeem.

The plaintiff, therefore, being a judgment creditor of J. D. Farwell, had a right to redeem from the whole sale. Having exercised that right, the next question is, for whose benefit did he redeem? If a debtor redeem, the effect of the sale is terminated. Did plaintiff's redemption terminate the sale as to the interest of W. H. Farwell, or was the effect of the redemption to transfer to plaintiff all the right, title, and interest which Winter had acquired by the sale? The statute provides that the last redemptioner shall be entitled to the sheriff's deed. If J. D. Farwell had redeemed, the effect of the sale would have been terminated, but as he would have been compelled to pay off the whole debt, he would have had a lien upon W. H. Farwell's share as security for one-half the amount paid.

The cases bearing upon the point in controversy are limited in number.

In *Erwin* v. *Schriver*, 19 John. 380, Chief Justice Spencer, delivering the opinion of the Court, said: "We are decidedly of opinion that Erwin (a judgment creditor of one of the tenants in common) has no right to a deed for all the lands thus purchased. His lien never extended to the whole, nor any further than to the individual right of the tenant in common, against whom he had a judgment. It never could have been the intention of the Legislature to give to a creditor a right of redemption to any other lands than such as were subject to the lien of the judgment creditor who offered to redeem. Beyond such lands he has no pretense to step into the place of the purchaser. The right to redeem can be coextensive only with the lien." The case went off, however, on the point that Erwin could not redeem a distinct parcel of the land sold, under the then existing statute in New York.

In *The People* v. *Haskins*, 7 Wend. 463, it was held, that a creditor whose judgment was a lien on a specific portion, the judgment having been rendered under a former statute not

allowing such redemption, could redeem under the Revised Statutes in force at the time of redemption, which allowed such redemption; but this case was overruled in the Court of Errors. (*Huntington* v. *Forkson*, 6 Hill, 149.)

Fischer v. *Eslamann*, 68 Ill. 78. Where the land of A. and B., owned by them as tenants in common, is sold upon foreclosure of a mortgage given by them, and is redeemed by a judgment creditor of A., and a deed made to the creditor, the latter will acquire no title to the interest of B.; but it seems that as such creditor succeeds to the portion of A., and was compelled to advance money to remove the prior incumbrance as to both A. and B., he will be entitled in equity to compel B., and those succeeding to his title, to contribute toward the cost of the redemption. Where one tenant in common removes an incumbrance from the common estate, the other tenants must contribute to the extent of their respective interests; and to secure such contribution a Court of Equity will enforce upon such interests an equitable lien.

The statute of Illinois, referring to the deed to be executed by the Sheriff, whether purchaser or redemptioner, provides that "such deed shall convey to the grantee therein named all the title, estate, and interest of the person against whom the execution was issued, of every nature and kind, in and to the premises thereby conveyed." It is provided that redemption may be made by the defendant within twelve months, and thereafter by a judgment creditor, and, the creditor having redeemed, "shall be considered as having bid at such sale the amount of the redemption money so paid by him," and the officer shall "execute a deed of the premises to him." This last provision, that the creditor "shall be considered as having bid," etc., is not in the statute of California.

Freeman in his work on Cotenancy, § 371, says: "A judgment creditor of one tenant in common may redeem the interest of such cotenant, but he must pay the entire sum which would be necessary to effect a redemption of the whole property; while by such redemption he can acquire nothing beyond the moiety of his judgment debtor." This is repeated in Freeman on Executions, § 321, and is stated on the authority of *Neilson* v. *Neilson*, 5 Barb. 565, and *Quinn* v. *Kenney*, 47 Cal. 147.

Quinn v. *Kenney* does not decide the principle ascribed to it, but in *Neilson* v. *Neilson* the principle is fully given, though not necessary to the case. This was an action of ejectment. H. Neilson, Post, Post, and Badgley were the owners of premises as tenants in common. For their joint debt the property was struck off at sheriff's sale to Badgley. Plaintiff G. W. Neilson, judgment creditor of H. Neilson, redeemed the premises from the sale. The Court say that plaintiff redeemed as a creditor of Henry Neilson alone. He could, therefore, acquire no greater estate than that which belonged to H. Neilson. If that was an undivided share, the plaintiff acquired it. The deed to the plaintiff does not affect the estate which either Badgley, Post, or Post had in the premises before the sale. Such estate, if it has not been redeemed, is still in Badgley. But, this action being against H. Neilson alone, he cannot complain; it will be time enough to adjust the rights of Badgley, Post, and Post, when they come before the Court.

There is no provision, in so many words, in the statute of this State for the redemption by the successor in interest of a judgment debtor from the redemption by a judgment creditor. Sec. 703 of the Code of Civil Procedure authorizes a *redemptioner* to redeem after redemption by a first redemptioner, and also authorizes the *judgment debtor* to redeem, but does not in terms confer the right upon a *grantee* of the debtor.

If the debtor redeem, the effect of the sale is terminated. If the redemption is by a redemptioner, and no later redemption be made, the redemptioner is entitled to a deed. Sec. 700 of the Code of Civil Procedure provides that upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto.

At first view it would seem, in the case at bar, that when plaintiff, Eldridge, redeemed from the sale to Winter, he was subrogated to and thence possessed all the rights of Winter, and that the sheriff's deed conveyed to plaintiff the entire title of J. D. and W. H. Farwell. But, taking into consideration that plaintiff's right to redeem at all was based upon a judgment against J. D. Farwell alone, that there was nothing in common existing between plaintiff and W. H. Farwell, it may well be urged that the views expressed by the courts in the cases above

cited are correct, and that plaintiff was subrogated to the rights of J. D. Farwell only; that if he, J. D. Farwell, had redeemed, he would have had his own title again redeemed, (*i. e.*, purchased back) and would have had an equitable lien upon the share of his joint owner for the proper amount thus paid to relieve that share; and that plaintiff, by redeeming, acquired the same position, was subrogated to the rights of his judgment debtor, and thus became the owner of the legal title formerly held by J. D. Farwell, and to an equitable lien upon the title formerly held by W. H. Farwell as security.

From an examination of the statute and of the cases above cited, I am of opinion that the view last above expressed is correct. The other view would compel defendant Wright, in redeeming, (if he had any right at all to redeem) to have paid not only the judgment against both the Farwells on the foreclosure, but the plaintiff's judgment aginst J. D. Farwell also, in order to relieve his interest as successor of W. H. Farwell from the foreclosure. I do not think that the Legislature intended that result.

Defendant should, therefore, have had an opportunity to interpose the defense set up in his answer, and prove, if he could, his right to relief. This being a proceeding in equity, the Court below has full authority to hear and determine all the rights of the parties. Defendant should have a reasonable time, to be fixed by the Court below, within which to pay to plaintiff one-half of the amount paid for the redemption from the sale on foreclosure, with interest; and in case of payment, be adjudged the owner of so much of said premises as was owned by W. H. Farwell: if he omit to make such payment, be adjudged to have waived his rights, and plaintiff adjudged to be the owner of the premises, free of any claim by defendant, and his title thereto quieted.

In my opinion the judgment of the Court below should be reversed, and the cause remanded to the Superior Court of the City and County of San Francisco, with instructions to overrule the demurrer of plaintiff to the defense set up and pleaded in the fourth paragraph of the defendant's answer, and that a trial be had and judgment rendered in accordance with the views herein expressed.

[No. 6,500.—In Bank.]

DOWNING *v.* GRAVES.

FINDINGS.—For a finding to be sufficient, either the ultimate fact must be found, or facts from which the ultimate fact is necessarily deducible.

CONTRACT—SUB-CONTRACTOR — ACTION—NOVATION — ASSIGNMENT.—One who contracts with another for the building of a house, does not thereby incur any liability to the sub-contractors of the original contractors, except such as may be fastened upon him by proceedings under the Mechanics' Lien law; and therefore, where there has been no assignment, or novation of the contract, an action cannot be maintained, (otherwise than under the Mechanics' Lien law) by a sub-contractor against the owner, for work and labor done and materials furnished in the construction of a building.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Twelfth District Court, City and County of San Francisco. DAINGERFIELD, J.

Bishop & Fifield, for Appellant.

The findings do not support the judgment. A man cannot recover of A. for work done under contract with B. (*Brown* v. *Aubrey*, 22 Cal. 566; *Walker* v. *Brown*, 28 Ill. 378; *Vanderwerker* v. *Vt. C. R. R. Co.* 1 Wms. (Vt.) 125; *Cleaves* v. *Stockwell*, 33 Me. 341; *The Indianapolis* v. *O'Reily*, 38 Ind. 140; *Marks* v. *Indianapolis R. Co.* 38 id. 440; *Perry* v. *Bailey*, 12 Kan. 539; *Parker* v. *Emery*, 28 Me. 492; *Benedict* v. *Danbury, etc. R. Co.* 24 Conn. 320.)

The findings do not cover the issues. There is no unequivocal finding that the work was by plaintiff done at defendant's "special instance and request." (*Lassing* v. *Paige*, 51 Cal. 575; *Zottman* v. *S. F.* 20 Cal. 96.)

Robinson, Olney & Byrne, and *W. W. Cope*, for Respondent.

The painting of the entire interior of the building was done by the plaintiff under the direction of the defendant, and during the progress of the work, O'Mahoney & Brother notified the defendant that the changes were so great that they would not be responsible for them. After the work had been done, the defendant notified the plaintiff to present his bill, which the plaintiff did. The only dispute was as to the value of the work; and, upon an attempt to arbitrate the matter, the defendant called in

as arbitrator, Mahoney, the original contractor. It is incredible that all the parties should act as they did, unless they supposed the old contract was done away with.

SHARPSTEIN, J.:

The plaintiff alleges in his complaint that between the 14th day of September, 1875, and the 12th day of August, 1876, he, at the special instance and request of the defendant, performed work and labor for and furnished materials to him, which were reasonably worth $7,539, no part of which has been paid except the sum of $2,900.

This allegation is denied by the defendant in his answer. Upon that issue the parties went to trial before the Court without a jury. The Court filed its findings of fact and conclusion of law, and thereupon ordered judgment to be entered in favor of the plaintiff for the sum of $5,117.05. Judgment was entered, and the defendant moved for a new trial upon a statement. The motion was denied, and from the order denying a new trial, and the judgment, this appeal is taken.

The first question to be considered is, whether the Court below found in favor of the plaintiff upon the main issue in the case, *i. e.*, that the plaintiff performed work and labor, and furnished materials for the defendant, at his special instance and request, reasonably worth the sum for which the Court ordered judgment to be entered. We think that it must be conceded that the Court did not directly so find. And if it did not, our next inquiry must be whether the Court has found facts from which the ultimate fact upon which the plaintiff could only recover is necessarily deducible. The Court, in effect, found that the defendant entered into a contract in writing with J. O'Mahoney & Brother to build him a house according to certain written specifications, which provided for the painting, and the manner in which it was to be done.

J. O'Mahoney & Brother entered into a verbal contract with the plaintiff, by which he agreed to do the painting described in said specifications for the sum of $2,900. The defendant directed the painting to be done in a much more elaborate and expensive style "than the specifications called for, and in such

a manner that the specifications cannot be used in estimating the value of the work actually done. Said changes in the kind and character of the work were done under the directions of the defendant, and frequent changes were made after the work had been nearly completed in accordance with the specifications or previous directions, making it necessary to repaint the work already done," and "that during the progress of the work J. O'Mahoney & Brother notified the defendant that the changes were so great that they would not be responsible for them, and that thereupon the sub-contractors, including Downing, were notified to present their bills to the defendant direct when the work should be done." The Court also found that the plaintiff did certain other painting for the defendant outside of the house to which the contract between J. O'Mahoney & Brother and defendant related. That the value of the labor and materials used in painting the house, for which no provision was made in said contract, was $274.10, and for whitening a cellar, $60. What the painting of the stable and fences was reasonably worth the Court omits to find.

Of the right of the plaintiff to recover the value of the labor and materials employed and used in the prosecution of other work for the defendant than that provided for by the contract between the defendant and J. O'Mahoney & Brother, we have no doubt; nor do we understand it to be a subject of controversy in this action. But we are unable to ascertain from the findings the value of the labor and materials so employed except as above stated. The Court further found: "That the sum of $2,900 would be a fair price for the work described in said specifications, and would fully pay for the labor and materials required to be performed and used therein, at the rates hereinafter fixed for the whole work." The Court then proceeds to find as follows:

"That all the work done by the plaintiff for the defendant was done in the best manner and of the best materials, and to the satisfaction of the defendant, and with the exception of the painting of the house, for which $274 is allowed plaintiff, all the said work was prosecuted at the same time, but interwoven with each other by reason of the workmen and materials being changed from one work to the other, whenever during the prog-

ress of the whole job more men could work to advantage on one part and less on another, or the reverse.

"That the reasonable and market value of the materials used and labor employed in performing the work in the complaint and hereinbefore set out, is the sum of $7,317.60.

"Of said sum the plaintiff has been paid by J. O'Mahoney & Brother the sum of $2,900, gold coin.

"That after all the said work had been completed, the defendant notified the plaintiff to present his bill, which the plaintiff did in the month of August, 1876.

"That the only dispute which arose between them was as to the value of the work, and the matter was not left to arbitration, because the parties could not agree upon the arbitrators; but nothing was ever at any time said about the provision of the specifications above set out in full, until the filing of the answer herein, by either plaintiff or defendant."

And as a conclusion of law from the foregoing facts, the Court found.

"1. That, on account of the manner in which the work hereinbefore described was carried on, and its character, the best method of arriving at its value is to take the reasonable and market value of the materials used, and the labor employed in its construction.

"2. That if the above specification, specifically set out, was ever a part of the plaintiff's contract, its observance was waived by the defendant.

"3. That the defendant is justly indebted to the plaintiff in the sum of $4,417.60, gold coin, for work and labor done and materials furnished, with interest thereon from October 15th, 1876, amounting to the further sum of $699.45.

"Let judgment be entered for the sum of $5,117.05, gold coin, and costs of the suit in favor of plaintiff."

Must we necessarily infer from these findings the ultimate fact, that the plaintiff, at the special instance and request of the defendant, painted the house which he contracted with J. O'Mahoney & Brother to build for him? If not, the findings will not support the judgment.

It is sufficiently clear that the Court below regarded the interference of the defendant in directing the work to be done in

a manner very different from what the specifications called for, and the notification of defendant by J. O'Mahoney & Brother, that they would not be responsible for the changes, and their notification of plaintiff that he must present his bill to the defendant direct when the work should be done, as constituting a cancellation of the contracts between defendant and the O'Mahoneys and the latter and the plaintiff, and the substitution of a contract between the plaintiff and defendant in relation to the same work. And such we understand to be the contention of the plaintiff's counsel in this Court. Before proceeding to express our views upon this point, we quote from the findings an extract from the specifications which form a part of the contract between the O'Mahoneys and the defendant. It is as follows:

"In case any additions, omissions, or alterations of the plans may be required by the owner during the progress of the work, they shall be acceded to by the contractor or contractors, and be carried into effect without in any way violating or vitiating any contract that may have been made for work or materials connected therewith; but the amount of such alterations, after it shall have been agreed on by the contractor or contractors and the architects, or in case of failure to agree, by an umpire chosen by them, shall be added to or deducted from the contract price, as the case may be, by an indorsement on the contract, or no allowance will be made for the same by either party."

Now it will probably be conceded, that if the original contractors had done this painting without the intervention of a sub-contractor, the defendant, by virtue of this stipulation, might have insisted upon all the departures which the Court finds that he did insist upon, from the specifications, without violating the contract between him and them. But it is urged on behalf of the plaintiff that he knew nothing of this stipulation. As the contract in which it was inserted was one to which he was not a party, it is quite immaterial whether he did or not. His ignorance could not absolve the O'Mahoneys from their obligation to observe it. The plaintiff's contract was with them. If they omitted to bind him to carry out their contract with defendant, that was a matter wholly between plaintiff and them, and one with which the defendant had no concern. He had a

right to insist that the original contractors, or whoever undertook to represent them in doing the work, should do it according to his contract with them. And that is all he is found to have done. The notices which the O'Mahoneys gave to the plaintiff can in no way affect the defendant; and the finding, that the defendant, after the work was done, notified the plaintiff to present his bill, has no bearing upon the main issue in the case. If the Court had not found that the plaintiff undertook to do the work under a contract between him and the O'Mahoneys, and there had been some controversy as to whether the defendant did not employ the plaintiff to do it, this fact might have a tendency to prove that the plaintiff did do the work at the special instance and request of the defendant. But the Court has directly found that he did not, and whatever may have transpired after the work was completed is wholly immaterial in this action. No defect in the findings can be cured by the evidence. We cannot find from the evidence an essential fact omitted by the Court below. We are satisfied, however, that the findings are quite as favorable to the plaintiff as the evidence will warrant. All that was said and done by the contractors, the plaintiff, defendant, and architect, in regard to the payment of the plaintiff's bill, satisfies us that the contract between the defendant and the contractors was recognized as subsisting and being in full force after the completion of the entire work. The plaintiff's counsel in his brief says:

"O'Mahoney & Brother, so far as appears, had nothing to do with the *extra work*, or the payment therefor, but were simply paid the original contract price for which they agreed to build the house.

"After Downing completed the painting, let us see if this new arrangement as to him was carried out, so far as anything at all was done.

"At folio 720, *et seq.*, it will be seen that Raun asked Downing to present his bill. At folio 721, Raun says: 'I asked him for the bill of *extra work*, and the other bills for the old house that he had painted for Mr. Graves. I said: Get your bills together, and come along and have it settled up.'

"'Q.—And if you had been satisfied with the bill, you would have certified to it and paid it? A.—I would have certified to

it at once. I got instructions from Mr. Graves in the *beginning to settle up* and be liberal, and not stand on a little money.' "

It will be observed that the counsel, as well as the witness whom he quotes, speaks of the unsettled claim of his client as one for *extra work*. Now he could have no claim for extra work unless it was done under the contract of the defendant with the O'Mahoneys. And it was clearly by virtue of that contract that he presented that claim. That contract required an architect's certificate, and if that could not be obtained for an amount satisfactory to the plaintiff, then there was a provision for arbitration. It is obvious the parties had these provisions of the contract in view during all their negotiations for a settlement. If that contract had been abandoned or cancelled, and the plaintiff had then thought that he was entitled to the reasonable value of his labor and materials, upon an implied contract of the defendant to pay what they were reasonably worth, there would be no allusion to an architect's certificate, much less to " extra work."

Judgment and order denying the defendant's motion for a new trial reversed.

ROSS, J., MCKEE, J., MCKINSTRY, J., and THORNTON, J., concurred.

[No. 10,531.—In Bank.]

EX PARTE WESTERFIELD.

CONSTITUTIONAL LAW—SUNDAY ACT—SPECIAL LAW—DEFINITION.—The Act of April 16th, 1880, "to regulate and provide for a day of rest in certain cases," making it a misdemeanor " for any person engaged in the business of baking to engage, or permit others in his employ to engage, in the business of baking for the purpose of sale, between the hours of 6 o'clock P. M. on Saturday and 6 o'clock P. M. on Sunday, etc.," is a special law, and, as such, in conflict with subd. 2, § 25, art. iv, of the Constitution.

HABEAS CORPUS.

F. H. Cassellun, and *H. E. Highton*, for Petitioner.

Graves & Collins, contra.

Myrick, J.:

The petitioner is in the custody of the Chief of Police of the City and County of San Francisco, under a warrant charging a misdemeanor under an act entitled "An Act to regulate and provide for a day of rest in certain cases," approved April 16th, 1880. (Stat. 1880, p. 80.)

The act provides that "it shall be unlawful for any person engaged in the business of baking to engage, or permit others in his employ to engage, in the labor of baking, for the purpose of sale, between the hours of 6 o'clock P. M. on Saturday and 6 o'clock P. M. on Sunday, except in the setting of sponge preparatory to the night's work; provided, however, that restaurants, hotels, and boarding-houses may do such baking as is necessary for their own consumption"; and a violation of the act is made a misdemeanor, punishable by fine and imprisonment, or both.

This act is in conflict with § 25, art. iv, of the Constitution, and is therefore void.

"Section 25. The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say; * * * * * Second.—For the punishment of crimes and misdemeanors."

The act purports, according to its title, to be an act to provide for a day of rest. Instead of pursuing that intent, it goes on to say that certain acts, viz., the labor of baking for the purpose of sale, if performed by certain persons, viz., persons "engaged in the business of baking for the purpose of sale," shall constitute a crime, and shall be punished. The employés are not to be punished. This is special legislation. A certain class is selected. As well might it have said, if master carpenters or blacksmiths, or if attorneys having clerks, shall labor or permit employés to labor, they shall be deemed guilty of a misdemeanor and be punished; carpenters or blacksmiths, not master workmen, or attorneys without clerks, may labor at their will. The baking of bread is in itself lawful and necessary. Even if there be authority to restrain the labor on some one day, it must be, if at all, under a general law restraining labor on that day.

Let the petitioner be discharged.

Thornton, J., concurred.

MCKINSTRY, J., concurring:

I concur. I entertain no doubt that the invalidity of the statute under which the defendant was arrested may be determined upon *habeas corpus*.

"Sunday laws" have been held not to be violative of a provision of a Constitution, that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State." (*Ex parte Andrews*, 18 Cal. 678.) Such laws have been sustained as imply requiring a periodical cessation from labor—the power to pass them resting upon the right of the Legislature to pass laws for the preservation of health and the promotion of good morals. I do not deem it necessary, in this place, to assent to the proposition that a law which enforces, under penalty of fine and imprisonment, a cessation from labor on Sunday by one whose religious belief has imposed upon him the duty of taking *his* rest on *Saturday*, in no degree discriminates against his "religious profession." But admitting the constitutionality of general laws prohibiting all labor upon Sunday, or upon any other day, I think the Act of April 16th, 1880, is a "special law," within the meaning of those terms as employed in § 25, art. iv, of the present Constitution. The act does not declare the business of "baking," as ordinarily conducted, to be a nuisance, nor does it contain any intimation that the business of baking may tend to interrupt divine worship by any class of sectaries, or can otherwise interfere with the rights or privileges of any citizen. The baking of bread is not only lawful and necessary, but we will take notice that there is nothing so peculiar in the occupation as that those engaged in it require—as a sanitary measure or for the protection of their morals—a period of rest not required by those engaged in many other employments.

A general law must include within its sanction all who come within its purpose and scope. It must be as broad as its object. If it is to be made a crime not to refrain from labor during the whole or during a portion of any given day of the week, it must be made equally a crime as to all persons who do not so refrain; or the prohibitory law must be made applicable to all of a class,

the members of which, for reasons apparent, upon mention of the class, *may* at least require, for the benefit of their health or morals, a period of rest not beneficial to any other class or individual. We might perhaps take notice that there are controlling reasons why clergymen should not be prohibited from pursuing their pious labors on the Christian Sabbath, and that a law might still be general which included all others, although it excluded them. So we might perhaps hold that there are other special classes who might be permitted to pursue their avocations, nowithstanding a law which prohibited labor by the rest of the community, because of the fact that their peculiar pursuits involved "works of necessity," and placed them beyond the benefits of a law, which would compel an enforced cessation of labor by others. But there can be no rule which will permit the prohibition of a particular kind of labor in itself innocent and beneficial to the public. There is no reason, and can be no reason, why *bakers* should be forced to rest from their labors periodically, which is not applicable to many other classes of artisans and workmen. To say that every law is "general" within the meaning of the Constitution, which bears equally upon all to whom it is applicable, is to say that there can be no special laws.

Sharpstein, J., concurred in the judgment.

[Mr. Justice Ross and Mr. Justice McKee, not having heard the argument, took no part in the decision of this case.]

[No. 6,647.—Department No. 2.]

JACOBI *v.* BAUR.

COSTS—LIBEL AND SLANDER—CONSTRUCTION OF STATUTE.—Section 7 of the Act of March 23rd, 1872, "concerning actions for libel and slander," does not give a plaintiff recovering judgment any costs beyond the amount allowed by the general law as provided in the Code of Civil Procedure. *Held*, accordingly, that a plaintiff in an action of slander, who recovered less than $300, was not entitled to costs.

APPEAL from a judgment for the plaintiff and from an order denying a motion by defendant to strike out the cost bill of the plaintiff, in the Twenty-Second District Court, County of Sonoma. TEMPLE, J.

E. S. Lippett, and *Barclay Henley*, for Appellant.

The Act of March 23rd, 1872, concerning actions for libel and slander, is to be construed in connection with §§ 1022, 1025, of the Code of Civil Procedure. (Code Civ. Proc. § 1858; *People* v. *Southwell*, 46 Cal. 141; *Black* v. *Scott*, 2 Brock. 325; *State* v. *Rackley*, 2 Blackf. (Ind.) 249; *People* v. *Jackson*, 30 Cal. 427; *Merrill* v. *Gorham*, 6 Cal. 41; *Pearce* v. *Atwood*, 13 Mass. 324.)

The act construed with reference to the Code means, that in case the plaintiff recovers over $300, he shall be allowed as costs, $100 to cover counsel fees, etc.

George Pearce, for Respondents.

The act concerning actions for libel and slander of March 23rd, 1872, is special; it does not purport to be amendatory of any other act, and was approved after the Code of Civil Procedure.

Sections 1022 and 1025 of the Code of Civil Procedure are to be construed as continuing acts of date long anterior to the act in regard to libel and slander. (Code Civ. Proc. § 5.)

An act must be read according to the ordinary and grammatical sense of the words, unless being so read it would be absurd or inconsistent with the declared intention of the Legislature, to be collected from the rest of the act. (*Smith* v. *Bell*, 10 M. and W. 378; *Turner* v. *Sheffield Railway*, id. 425; *Hyde*

v. *Johnson*, 2 Bing. N. C. (Eng.) 776; E. C. L. R. 29; Broom's Legal Maxims, 36 and 78, 3rd edition.)

The Court:

This was an action to recover damages for slander. The plaintiff had a verdict for one dollar. He filed a memorandum of costs and disbursements amounting to $390.25, which defendant moved to strike out. This motion was denied by the Court and defendant excepted. Defendant appealed from the judgment, and the order denying his motion above mentioned.

We are of opinion that the Court erred in denying the motion. The seventh section of the Act of 23rd of March, 1872, entitled an act concerning actions for libel and slander, (Statutes of 1871–72, p. 533) does not give plaintiff recovering judgment any costs beyond the amount allowed by the general law as provided in the Code of Civil Procedure. The costs are left as under the general statute. By the general law, the plaintiff is not entitled to any costs at all, having recovered less than $300.

The judgment is affirmed, and the order denying defendant's motion to strike out is reversed.

[No. 6,044.—In Bank.]

HARPENDING *v.* MEYER ET AL.

CONVERSION—BAILEE—ACTION—STATUTE OF LIMITATIONS.—Where the possession of property is obtained, (in good faith or otherwise) from one who had no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession, and no demand or further act of conversion is necessary. Accordingly, in an action against defendants, who had, in good faith, and without notice of the plaintiff's rights, received in pledge the plaintiff's goods from her bailee, and afterward sold them, *held*, that the Statute of Limitations commenced to run from the time of the defendant acquiring possession, and not from the time of the subsequent sale by them.

APPEAL from a judgment for the defendants, in the Nineteenth District Court, City and County of San Francisco. WHEELER, J.

Robinson, Olney & Byrne, and *Warren Olney*, for Appellant.

The plaintiff is entitled to judgment, unless her right of action is barred by the Statute of Limitations; and if the defendants were not guilty of conversion until they sold the goods, then the action is not barred. An innocent purchaser from a wrong-doer is not guilty of conversion (while he holds possession) until informed of the defect of his title, and an opportunity given to deliver the property to the true owner. (*Parker* v. *Middlebrook*, 24 Conn. 207; *Ross* v. *Johnson*, 5 Burr. 2825; *Shelton* v. *French*, 33 Conn. 489; *Gillett* v. *Roberts*, 57 N. Y. 28; 2 Greenl. Ev. 642; 3 Phill. Ev. 540; *Buffington* v. *Ulen*, 7 Ky. 231; *Witherspoon* v. *Blewett*, 47 Miss. 570; Civ. Code, §§ 2888, 2986–3011; *Ely* v. *Ehle*, 3 Comst. 506; *Barrett* v. *Warren*, 3 Hill, 348; *Roberts* v. *Berdell*, 61 Barb. 37; *Andrews* v. *Smithwick*, 34 Tex. 544; *Blankenship* v. *Perry*, 28 id. 448; *Carroll* v. *Mix*, 51 Barb. 212; *Dudley* v. *Hawley*, 40 id. 397; *Loring* v. *Mulcahy*, 3 Allen, 575; *Johnson* v. *Couillard*, 4 id. 446; *Gillmore* v. *Newton*, 9 id. 171; *Dowd* v. *Wadsworth*, 2 Dev. 130; *Macombie* v. *Davis*, 6 East, 538; *Philpott* v. *Kelly*, 4 Nev. & M. 611; *Smith* v. *Young*, 1 Camp. 439; *Packer* v. *Gillies*, 2 id. 336 n.)

C. L. Ackerman, and *J. C. Bates*, for Respondents.

The cause of action accrued at the date of the conversion, and from that date the statute commenced to run. (*Granger* v. *George*, 5 Barn. & C. 149; *Short* v. *McCarty*, 3 Barn. & Ald. 626; *Brown* v. *Howard*, 2 Brod. & B. 73; *Thomas* v. *Brooks*, 6 Tex. 371; *Johnson* v. *White*, 13 Smedes & M. 584; *Thomas* v. *Greer*, 6 Tex. 372; *Ward* v. *Dulaney*, 23 Miss. 410; *Jordan* v. *Thornton*, 7 Ga. 517; *Smith* v. *Newby*, 13 Mo. 159; *Clark* v. *Marriott*, 9 Gill, 331; *Clarke* v. *Reeder*, 1 Spear, 398; *Simons* v. *Fox*, 12 Rich. 392; *Fears* v. *Sykes*, 35 Miss. 633; *Read* v. *Markle*, 3 Johns. 524; *Sims* v. *Canfield*, 2 Ala. 561; *Coffey* v. *Wilkerson*, 1 Met. (Ky.) 101.)

From the instant of the *taking* defendants were *trespassers*, and the statute ran. (*Boulware* v. *Craddock*, 30 Cal. 190;

Lewis v. *Johns*, 34 id. 630; *Connah* v. *Hall*, 23 Wend. 462; *Thomas* v. *Brooks*, 6 Tex. 369; *Thomas* v. *Greer*, id. 377; *Granger* v. *George*, 5 Barn. & C. 149; *Thrall* v. *Lathrop*, 30 Vt. 307; *Prime* v. *Cobb*, 63 Me. 200; *Trudo* v. *Anderson*, 10 Mich. 357; *Whitney* v. *McConnell*, 29 id. 12; *Whitman G. & C. Co.* v. *Tritle et al.*, 4 Nev. 494; *Perkins* v. *Barnes*, 3 id. 557; *Clark* v. *Lewis*, 35 Ill. 417; *Wells* v. *Ragland*, 1 Swan, 501.)

SHARPSTEIN, J.:

By the findings of fact, which are conceded to be correct, it appears that on the 5th day of April, 1873, the plaintiff deposited with one Baux of San Francisco, certain jewelry. In about one month thereafter, the plaintiff, being about to leave San Francisco and to go to St. Louis, demanded her jewelry of said Baux, and he pretending that his father had the key to the safe induced her to leave without her jewelry, promising to forward it by express to her at St. Louis, so that it would reach there nearly as soon as she would. In fact, however, he had then pawned and delivered a part of said jewelry to the defendants, who were pawnbrokers, and on the 17th day of May, 1873, he pawned and delivered a part of the residue of said jewelry to them, and on the following 9th day of July he pawned and delivered the entire residue thereof to them. Baux did not redeem the pledge, and on the 6th day of June, 1874, defendants sold it in the manner provided by law. On the 24th of July, 1876, plaintiff demanded said jewelry of the defendants, or its value, and said demand not being complied with she commenced this action. She alleges, among other things, that the defendants on the 6th day of June, 1874, unlawfully converted and disposed of said jewelry, and then alleges that on the 24th day of July, 1876, she demanded it as above stated. The judgment demanded is for the possession of the property, or if that cannot be had, for the value of it.

One of the allegations of the answer is, that the cause of action did not arise or accrue within three years before the commencement of the action, and that it is barred by subdivision 3 of § 338 of the Code of Civil Procedure. The Court rendered judgment in favor of the defendant, and from that judgment the plaintiff appeals to this Court.

The sole question which we have to consider is, whether the action was commenced within three years after the right of action accrued. All the cases agree in this, that a right of action accrues in favor of the owner of goods as soon as they are wrongfully taken from his possession, or wrongfully converted by one who rightfully came into possession of them. No right of action accrued against the defendants in this case until they took the plaintiff's property without her assent. And, according to the New York cases and decisions in some of the other States, no right of action, in the absence of a demand, accrued until they sold it. So far as we are advised, neither that or the opposite doctrine has ever been expressly adopted in this State. We are, therefore, at liberty to adopt the doctrine which we think to be the more reasonable.

The reason of the New York rule, as stated by Mr. Justice Bronson in *Barrett* v. *Warren*, 3 Hill, 348, is that "a man who innocently purchases property, supposing he should acquire a good title, ought not to be subjected to an action until he has an opportunity to restore the goods to the true owner." In this case the reason of the rule ceases, because if the defendants had not supposed that Baux had a good title to the property, a cause of action would have accrued in favor of the plaintiff at the moment of their obtaining possession of it, and consequently would have been barred by the Statute of Limitations when this action was commenced. It clearly was not the intention of the courts which laid down or adopted that rule, to place an innocent *bona fide* purchaser in a worse position than an original wrong-doer would occupy, as it obviously would when applied to a case like that now before us.

Of the New York doctrine Mr. Justice Cowen, in *Barrett* v. *Warren*, *supra*, says: "I will not, however, deny that an exception in favor of the taker, where he is a *bona fide* purchaser from the wrong-doer, has found its way into the books; nor that however discordant it be with established principles, it may, at least in this State, have become too inveterate to be displaced." Again in the same opinion, he says: "The result is that no English adjudication creates an exception in favor of one who purchases from the tortious taker of another's property." He further expresses the opionion that the New York rule origina-

ted in a misconception of the English cases upon the subject. In this view of the matter he is sustained by Mr. Justice Metcalf, whose opinion was concurred in by Justices Shaw and Dewey, in *Stanley* v. *Gaylord*, 1 Cush. 536, who, in referring to the remarks of Mr. Justice Cowen that the rule which created an exception in favor of a *bona fide* purchaser might have become too inveterate in New York to be displaced, says: "We are not embarrassed by any decisions in this commonwealth which are discordant with established principles; and therefore we deem ourselves not only warranted, but bound, to decide this case according to those principles which we find well stated by Weston, J., in *Galvin* v. *Bacon*, 2 Fairf. 28, as follows: "Whoever takes the property of another without his assent, express or implied, or without the assent of some one authorized to act in his behalf, takes it, in the eye of the law, tortiously. His possession is not lawful against the true owner. That is unlawful which is not justified or warranted by law; and of this character may be some acts which are not attended with any moral turpitude. A party honestly and fairly, and for a valuable consideration, buys goods from one who had stolen them. He acquires no rights under his purchase. The guilty party had no rightful possession against the true owner, and he could convey none to another. The purchaser is not liable to be charged criminally, because innocent of any intentional wrong; but the owner may avail himself, against him, of all civil remedies provided by law for the protection of property. If the bailee of property for a special purpose sells it without right, the purchaser does not thereby acquire a lawful title or possession. In the case before us the defendant came honestly by the horse, but he did not receive possession of him from one authorized to give it, and is, therefore, liable *civiliter* to the true owner for the taking as well as for the detention.'"

Stanley v. *Gaylord*, *supra*, was a case where the bailee had mortgaged as security for his own debt the property of his bailor, and the mortgagee took possession of it under his mortgage; and the bailor sued the mortgagee in trespass.

In *Galvin* v. *Bacon*, *supra*, the plaintiff being the owner of a horse, bailed him to A. for use for a limited period, under the expectation of a purchase by the latter. During the time, A., for a valuable consideration and without notice, sold the horse to B.,

and he in like manner to the defendant, and the Court held that no previous *demand* was necessary to enable the owner to maintain *replevin* against the last purchaser. In Michigan and Vermont the same doctrine prevails.

In *Wells* v. *Ragland*, 1 Swan, (Tenn.) 501, it is distinctly held that where the possession of property is obtained from one who had no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession of it; that the bare taking of possession under such circumstances constitutes a new conversion on the part of the person taking it, and that from the time of the commission of that act, the statute will commence running.

It has been held in this State that the exemption from being sued without previous demand does not apply to sheriffs who seize upon execution property in the possession of but not belonging to the execution debtor (*Ledley* v. *Hays*, 1 Cal. 160; *Boulware* v. *Craddock*, 30 id. 190; *Wellman* v. *English*, 38 id. 583); nor to an execution creditor who purchases at sheriff's sale property so seized (*Sargent* v. *Sturm*, 23 id. 359); nor to a purchaser for value who had notice, before he removed the property, sufficient to put him upon inquiry as to the true ownership, even though such notice was not received until payment of the purchase price (*Scriber* v. *Masten*, 11 id. 303). None of these cases conflict with any decision made elsewhere upon the points involved in them, so far as we are advised, and they are not cited because of any bearing that they are supposed to have upon the point now under consideration, but merely for the purpose of showing that the question under consideration is an open one in this State.

It will be observed that wherever the doctrine of exemption prevails, it is strictly limited to what are termed *bona fide* purchasers for value and without notice.

We are unable to perceive, however, that a person can ever be considered a *bona fide* purchaser of goods from one who has no right to sell, in a case where the rule *caveat emptor* applies. The law imputes notice to him. Under that rule he is not only put upon inquiry, but he is conclusively presumed to have ascertained the true ownership of the property before purchasing it. If he has notice in fact, no demand upon him for the property is necessary before commencing the action to recover it. If he is

chargeable with constructive notice, the result in all other cases is the same. But, as we have before stated, the operation of a rule which exempts a *bona fide* purchaser from being sued until after demand made, is, in all the cases to which it has been applied, favorable to the *bona fide* purchaser, and it is claimed to have been devised for his protection. If applied to this case, its operation is exactly the reverse of that. To hold that the statute did not commence running in favor of these defendants from the time of the delivery of the goods to them, because at that time they were conscious of no wrong-doing, which, if they had been conscious of, would have set the statute in motion in their favor, involves an absurdity. And when one construction of the law will lead to absurd consequences and another will not, it is the duty of the Court to adopt the latter. One construction of the law in this case would have set the statute in motion at the time of the delivery of the goods from Baux to defendants if they had known that he was not the owner of them, but as they did not know that fact, the statute did not commence running until they sold or otherwise converted the goods. That is more favorable to the *mala fide* than to the *bona fide* purchaser. But that must be the obvious result if we apply to this case the rule contended for by the appellant. We are unwilling to give a conscious wrong-doer any advantage over a constructive wrong-doer. And the rule which we shall apply in this case will simply have the effect to put them on an equal footing. We shall hold, in accordance with the rule adopted in Maine, Michigan, Vermont, and Massachusetts, that the defendants having acquired the possession of plaintiff's property by and through the tortious acts of Baux, and not otherwise, such possession was tortious from its commencement, and constituted a conversion of the plaintiff's property, for which she might at any time within three years thereafter have maintained an action without previously making any demand, and that the omission to commence an action within that time, constitutes a bar to this action.

Judgment affirmed.

MORRISON, C. J., MCKINSTRY, J., ROSS, J., and THORNTON, J., concurred.

MYRICK, J., dissenting:

I dissent. I think that the rule known as the New York rule would be the most proper rule to adopt in this State, and that the Statute of Limitations should be held to have commenced to run from the time of the sale of the property by the pledgee.

McKEE, J., dissenting:

I am of the opinion that the plaintiff's cause of action is not barred by the Statute of Limitations.

It is admitted that the property in controversy was delivered to the defendants by the voluntary trustee of the plaintiff in the month of May, 1873; that the defendants sold it on the 6th of June, 1874; and that the plaintiff did not discover the sale, or the fact that the defendants had got possession from her trustee, until July, 1876.

When the defendants got possession in 1873, by the transaction between them and Baux, they became, under §§ 2233, 2224, and 2243 of the Civil Code, the involuntary trustees of the property for the benefit of the owners, and subject to all the duties, rights, and obligations of that relation. In taking possession of the property, they did not take it by force or fraud from the actual or virtual possession of the plaintiff; it was delivered to them by the voluntary trustee: the taking was, therefore, not tortious.

The possession thus assumed by the defendants continued until they wrongfully deprived the plaintiff of the property by a sale, or wrongfully refused, on demand, to deliver it to him.

At the time that the plaintiff discovered the transaction whereby the defendants had got the possession, the property was not *then* in their possession. If it had been, it would have been the duty of the defendants, as involuntary trustees of the property, to have delivered it to the plaintiff on demand. Refusal to do so would have been a breach of duty. Non-delivery to the owner after notice and demand is a conversion. But the defendants had sold the property, and the sale was also a conversion, the plaintiff, however, was ignorant of the sale, and did not discover it until July, 1876. When she did discover it,

she had a right to demand of the defendants to replace the property sold, with its fruits, or to account for its proceeds. (§ 2237, Civ. Code.) In either case, I think, the legal presumption is, that the owner consents to the custody and use of her property, until she discovers that it had been wrongfully dealt with; and that a conversion took place when, upon that discovery, the trustee refused to deliver or account for it on demand.

In *Alvord* v. *Davenport*, 43 Vt. 30, a person to whom had been let a horse and buggy, left them with a hotel-keeper and disappeared. The hotel-keeper suspected something wrong, but did not know who or where the owner was, and the owner did not know where his property was. He advertised for it, but did not discover anything concerning it, until more than five years had elapsed, when he heard that the property was in the possession of the defendant, the hotel-keeper. He went and found it there, and, identifying it as his property, he demanded it. The defendant refused to deliver it, and the owner sued him in trover; and the Supreme Court of Vermont held that up to the time of the demand and refusal there was no conversion.

In *Wilkinson et al.* v. *Verity*, 6 Law R. C. P. C. 206—"where goods having been bailed by the plaintiffs to the defendant for safe custody, the defendant wrongfully sold them, and the plaintiffs, more than six years after the date of the sale, being ignorant of the fact of its having taken place, demanded the return of the goods, which the defendant refused—it was held, in an action of *detinue* for the goods, that the Statute of Limitations ran from the date of the demand and refusal, and not from that of the sale, inasmuch as the plaintiffs, in such a case, though entitled, if they had discovered the sale, to sue immediately for a conversion of the goods, were also entitled to elect to sue upon the breach of the bailee's duty in the ordinary course, by the refusal to deliver on request."

I think that the plaintiff in the case in hand was entitled to judgment, and that the judgment of the Court below should be reversed.

[No. 6,358.—Department No. 2.]

HOAG *v.* HOWARD.

ATTACHMENT—RECORD OF DEED.—A writ of attachment is not an "instrument," within the sense of that term as used in § 1107 of the Code of Civil Procedure; and therefore, a deed, executed prior to the levy of an attachment upon the property conveyed, though not recorded until after the levy, will prevail over the attachment.

INSTRUMENT—DEFINITION.—The word instrument, as used in the Codes, invariably means some written paper or instrument signed and delivered by one person to another, transferring the title to, or giving a lien, on property, or giving a right to debt or duty.

CONSTRUCTION OF STATUTE.—Where a word or clause is found repeatedly used in a statute, it will be presumed to bear the same meaning throughout, unless there is something to show that another meaning is intended.

APPEAL from an order granting a new trial, in the Twenty-second District Court, County of Sonoma. WALLACE, J.

J. G. Pressley, and *E. L. Whipple*, for Appellant.

An attachment properly levied takes precedence of an unrecorded deed of which the plaintiff in attachment had no notice. (Civ. Code, §§ 1107, 1114.) Before the Code, the unrecorded deed took precedence (*Plant* v. *Smythe*, 45 Cal. 161); but the sections of the Civil Code, above referred to, were made for the purpose of changing the rule.

Geo. Pearce, for Respondent.

The appellant is not a purchaser in good faith or for a valuable consideration, within the meaning of § 1107 of the Code of Civil Procedure; because he did not acquire a title by an *instrument* that was first duly recorded. Nor is he an incumbrancer for the same reasons.

THORNTON, J.:

In this cause, which was an action to recover possession of a parcel of land, the only question presented is, whether a party whose title is made out by a deed not recorded until after the lien of an attachment had been perfected, is superior to that of one who makes title by conveyance from an attachment creditor who has recovered judgment in the action, had execution issued,

has become the purchaser at the execution sale, and received the sheriff's certificate and deed. The grantor in the unrecorded deed and the defendant in the attachment suit is the same person.

It is conceded that prior to the adoption of the Civil Code, the title of the former would prevail. (*Plant* v. *Smythe*, 45 Cal. 161.)

The section of the Civil Code referred to as changing the rule is § 1107, and is in these words:

"Every grant of an estate in real property is conclusive against the grantor, also every one subsequently claiming under him, except a purchaser or incumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded."

The lien here, as we have stated, is claimed under a writ of attachment, and it is contended that the writ of attachment is an instrument in the sense of the statute.

Now, what is the meaning of the word *instrument*, as used in the section referred to? To ascertain this, the provisions of the Civil Code, which is one act of the Legislature, must be examined.

In examining the provisions of a statute in order to ascertain its meaning, every part of it must be looked to, and where a word or clause is found repeatedly used in it, it will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended. (*Pitte* v. *Shipley*, 46 Cal. 160; see also *Robbins* v. *O. R. R. Co.* 32 id. 472; *Green* v. *Weller*, 32 Miss. 650.)

If we look into the provisions of the Code in which the word "instrument" is used, it will be invariably found to indicate some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty. In the title (IV of Part IV, Second Division) in which the section above quoted (1107) is found, this word is frequently employed. It is used in the following sections of this title: 1053, 1056, 1059, 1091, 1093, 1094, 1095, 1106, 1107, 1110, 1135, 1158, 1161, 1162, 1165, 1170, 1172, 1180, 1181, 1182, 1183, 1185, 1186, 1188, 1190, 1193, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202,

1203, 1204, 1205, 1207, 1215, 1216, 1227, 1228, 1229, and also in §§ 709, 994, 1451, 1629, 3087, 3413, 3414.

A cursory perusal of these sections will show that the word has the meaning above attributed to it, and that it nowhere embraces the case of a writ of any kind issued by a court, or officer, or any other authority. Reference is particularly made to §§ 1195 and 1215. Section 1195 relates to the proof of the execution of the instrument, and provides that it may be proved "by the party executing it, or either of them." Section 1215 defines the meaning of the term "conveyance" as used in the two preceding sections, as embracing "every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to real property may be affected, except wills."

Section 1629 abolishes all distinctions between *sealed* and *unsealed* instruments. Title II, Part II, of Division four, is entitled: "Fraudulent instruments and transfers." In §§ 1459 and 3087, the word "instruments" has "negotiable" prefixed to it.

The sections above cited show that the signification of the word "instrument," as used in § 1107, is correctly given above. In fact, the word "instrument" appears to be used, as suggested by Abbott in his definition of the word, (see Abbott's Law Dictionary, word "Instrument") as an abbreviated form of written instrument, the word written being elided.

It is provided by § 1158, that "any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter." Now, it is manifest, from the quoted words, that a judgment is not an instrument within the meaning of the act. If it were, special mention of it would be unnecessary, as it would be comprehended in the word instrument. If a judgment is not such an instrument, we cannot see how it can be maintained that a writ is.

Other considerations might be urged, but these are sufficient to show that the lien by attachment is not such a one as is referred to in § 1107 of the Civil Code.

As a deduction from the above, the conclusion results that the party claiming under the deed not recorded, when the attachment lien became perfect, must prevail.

The Court below reached the same conclusion, and granted a

new trial, from which this appeal is prosecuted. This order was properly made, and the order appealed from is affirmed.

SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 6,825.—Department No. 2.]

WINANS v. CHENEY ET AL.

DESCRIPTION IN DEED—BOUNDARY—QUANTITY—CONSTRUCTION.—A call in a deed for metes and bounds, if clear, will prevail over a call for quantity; but, where the boundaries are doubtful, quantity often becomes a controlling consideration.

APPEAL from a judgment for the defendant, and from an order denying a new trial, in the Fourth District Court, County of Sonoma. TEMPLE, J.

J. W. Winans, for Appellant.

The deed of plaintiff makes the western boundary of her land "the summit of the ridge dividing the Valley of Petaluma from Sonoma Valley." We submit that, by the evidence, the western range is not only shown to be in its physical character the ridge which divides the two valleys, but it is also established by other circumstances, as the very ridge referred to in the deed. The quantity, being the least certain part of the description, must yield to the boundaries. (*Stanley* v. *Green*, 12 Cal. 166; *Schoonmaker* v. *Davis*, 44 Barb. 463; *De Arguello* v. *Greer*, 26 Cal. 615; *Wendell* v. *The People*, 8 Wend. 190; *Colton* v. *Seavey*, 22 Cal. 496; *Chipman* v. *Briggs*, 5 id. 76; *Jackson* v. *McConnell*, 19 Wend. 175.) All doubts as to the meaning of the deed must be solved in favor of the grantee. (*Piper* v. *True*, 36 Cal. 606; *Salmon* v. *Wilson*, 41 id. 595; *Muller* v. *Boggs*, 25 id. 175.) In *Winans* v. *Murray*, No. 3179, (not reported) the same question here involved was, upon similar evidence, before the Court, and the Court held that the western range was the boundary called for.

William D. Bliss, and *E. S. Lippitt*, for Respondent.

The statement of the quantity of land to be conveyed is an important element in determining whether the higher or lower ridge is to be taken as the boundary. It points clearly to the higher ridge. (*Doe* v. *Vallejo*, 29 Cal. 386; *Field* v. *Columbet*, 4 Sawy. 523; *McCune* v. *Hull*, 24 Mo. 573; *Kirkland* v. *Way*, 3 Rich. 4; *Herrick* v. *Sixby*, Law R. P. C. vol. 1, p. 452.) The other calls lead to the same conclusion.

THORNTON, J.:

The action was ejectment, brought to recover a parcel of land in Sonoma County. The cause was tried by the Court, and judgment passed for defendants. Plaintiff moved for a new trial, which was denied, and plaintiff appealed from the judgment and order denying his motion.

The main question argued relates to the western boundary of a parcel of land conveyed by M. G. Vallejo to one Hiram Leonard on the 20th day of October, 1857, under which plaintiff claims. There appeared to be two ranges of hills or mountains, one lying east of the other. The east range is the higher of the two. Plaintiff contends that the western boundary of the tract is a line running along the summit of the western range. Defendants contend that the western boundary is a line running along the summit of the eastern ridge. If the contention of the plaintiff is correct, she is entitled to recover, inasmuch as the line running on the summit of the western range would include the parcel of land claimed by defendants. If the view urged by the defendant is the true one, plaintiff must fail, and the judgment and order appealed from must stand.

The question as to the proper location of the line was fully discussed on the argument, and reference was made quite fully to the testimony in the cause. We have examined this testimony carefully, and cannot, after full consideration, conclude that the decision of the Court below is not correct.

An opinion of the learned Judge of the Court *a qua* is printed in the record. It satisfies us that the question above stated was elaborately examined by him, and every phase of it fully inves-

tigated. We cannot discover any misapplication of the rules laid down by jurists for the determination of questions of this character. The evidence disclosed an ambiguity as to the range of mountains referred to. The deed described the land. In the statement it appeared that the land described contained "one thousand and fifty-six acres, more or less." It is testified to by a witness, who was a surveyor, that he had made an accurate survey of the Leonard tract as claimed by plaintiff and defendants: that as claimed by the former his survey made it 1,737 13-100; by the latter, 1,067 19-100 acres.

In regard to this matter the learned Judge, in his opinion above mentioned, says that the quantity indicates the highest ridge as the range of mountains referred to in the deed. He proceeds thus:

"Quantity, of course, of itself is no description. It does not give boundaries of course, therefore, metes and bounds will prevail where there is a conflict. But when boundaries are doubtful in themselves, quantity often becomes the controlling fact. It often makes the metes and bounds certain. The quantity, taking the eastern ridge as the boundary, approximates the quantity mentioned in the deed, being eleven acres more than the deed calls for. Taking the western ridge for the boundary it adds 680 acres, nearly two-thirds as much more, to the deed."

Such a discrepancy should not be disregarded in arriving at the proper location of the disputed boundary under the circumstances disclosed in the case. In our opinion the evidence sustains the findings.

The adoption of the eastern ridge as the boundary led to a judgment for defendants.

We have examined the other points discussed, and can find nothing erroneous in the conclusion reached by the Court below.

The judgment and order are affirmed.

SHARPSTEIN J., and MYRICK, J., concurred.

[No. 6,137.—Department No. 1.]

BLAND v. THE SOUTHERN PACIFIC R. R. CO.

RAILROAD—EJECTMENT OF PASSENGER FOR FAILURE TO PAY FARE—RESCISSION OF CONTRACT.—The plaintiff entered the defendant's cars without procuring a ticket, and handed to the conductor the ticket fare. The conductor thereupon demanded of the plaintiff the additional amount required by the rules of the company to be paid by persons paying on the train, and, on the plaintiff's refusal to pay, ejected him from the cars, and then returned him his money. *Held*, that the conductor had no right to eject the plaintiff without first returning the money which he had paid.

APPEAL from a judgment for the defendant, in the Twentieth District Court, County of Santa Clara. BELDEN, J.

D. M. Delmas, for Appellant.

But two questions are presented in this case, viz:

First.—Can a common carrier both keep the money paid by the passenger as his fare, and still expel him for not paying his fare?

Second.—If the passenger has paid partial fare, does not his right to pay the balance continue as long as the carrier retains the partial payment?

It is submitted that to ask these questions is to answer them.

J. E. Foulds, and *S. W. Sanderson*, for Respondents.

The evidence is quite clear that at the time the two dollars was handed to the conductor, he informed plaintiff that the rules of the company required a further payment of twenty cents, so that whether the conductor put the money in his pocket, or held it in his hand, neither he nor the plaintiff supposed for one moment that it was received as full payment of the fare. There was, and could have been, no contract between them. "The minds of the parties," to use the language of the learned District Judge, "had not met upon one common proposition," and the money was held for a limited period by the conductor in order to give the plaintiff an opportunity to comply with the rules of the company, by paying the further sum required, and was returned to him when he was expelled from the train.

This was submitted to the jury as an issue, and by their verdict for the defendant, they found that it was not the intention of the plaintiff to pay full fare, or the intention of the conductor to receive the two dollars as full fare, when the same was paid to him.

A valid legal-tender must be of the *full amount*, and the exception of the conductor to the same was made *at the time*, in accordance with the provisions of § 2076 of the Code of Civil Procedure, and completely avoided it. There was, therefore, no legal obligation on him to return the same *before* putting the plaintiff off the train, and the instructions of the Court were in accordance with the law, as the plaintiff had not, by such payment, acquired any of the rights of a *bona fide* passenger.

McKINSTRY, J.:

The complaint alleges that while plaintiff was a passenger upon defendant's cars, the defendant unlawfully, maliciously, and wantonly assaulted, beat, bruised, insulted, and maltreated plaintiff, and with force of arms ejected him from said cars. The answer is a denial, and, as a further defense, that after the train had started upon a regular trip to San Francisco, plaintiff informed the conductor in charge of the train that he intended to and would be transported from San José to San Francisco; that the conductor demanded of plaintiff that he exhibit a ticket, or pay the regular and uniform price for fare; that plaintiff refused to exhibit a ticket or to pay the regular fare, and thereupon, and after a reasonable time had expired, after said demand and refusal, the plaintiff was, by the servants of defendant, removed from the cars, without force, or violence, or injury, or insult.

As appears from the bill of exceptions, the plaintiff entered the cars as a passenger at San José, in a train bound for San Francisco, but stopping at intermediate points, amongst others at Redwood City. That the plaintiff might have purchased a ticket at San José, but did not do so on account of arriving at the depot just as the train was starting. That when about four miles from the City of San José the conductor came to where

the plaintiff was sitting, and the plaintiff handed him $2 in silver. That the conductor put said money in his pocket, and informed plaintiff that the fare was $2.20—that the ticket fare from San José to San Francisco was $2, and the train fare was $2.20; that the ticket fare to Redwood City was $1, and the train fare $1.10. That when the plaintiff handed the conductor the $2, nothing was said by either party as to where the plaintiff was going or intended to go, but it was the plaintiff's intention to proceed on that train as far as Redwood City, and there lay over until the next train. That after the demand for the extra twenty cents by the conductor, the plaintiff refused to pay the same, and thereupon the conductor signaled the train to stop. When the train had slowed up, the plaintiff offered to pay said conductor the twenty cents demanded, and was then ready and willing and had the money in his hand to so pay; but the conductor refused to accept it, there being a regulation of the company (which regulation was duly given in evidence) forbidding the conductor from accepting fare from passengers after the train had been stopped on account of their refusal to pay fare. That when it had stopped, the conductor laid hands upon the plaintiff, pulled him out of his seat, and, having hold of his coat collar, pushed him out of the car. That as the plaintiff was in the act of alighting from the car, the conductor handed him back the two dollars; that the conductor did not at any time tender or offer to the plaintiff any money before that time. That the conductor did not give back to plaintiff the two dollars which he had paid, nor any part thereof, nor offer nor tender the same, nor any part thereof, nor any money whatsoever, until after he had pulled him out of his seat and pushed him out of the car as above stated.

The Court charged the jury as follows:

"Unless the jury believe from the evidence, that when the conductor received the $2 from the plaintiff he accepted and intended to accept it as full fare, the fact that the conductor did not return or offer to return said $2, nor any part thereof, to plaintiff, before putting him out of the car, is immaterial. In that view of the case, the conductor had a right to put the plaintiff out without returning the money."

And the Court further charged the jury as follows, to wit:

"If at the time the conductor received the $2 the minds of the parties met upon one common proposition, and it was the intention to pay full fare, and the intention of the conductor to accept said $2 as full fare, then it was the duty of the conductor to return or offer to return said $2 to the plaintiff, before putting him off for not paying the extra twenty cents; but unless the minds of the parties so met, the conductor might put the plaintiff off the car without returning or offering to return to him the said $2, or any part thereof."

The charge was erroneous. The conductor had no right to eject the plaintiff from the cars without returning the money which he had paid. Admitting that the regulation which forbade the conductor's accepting fare from a passenger after the train had been stopped on account of his refusal to pay fare, was a reasonable rule, this only makes it apparent that the money should have been returned before the train was stopped. There could be no stronger evidence that the sum paid was received as full fare than the fact that the conductor retained it. The passenger was justified in relying upon that fact until the money was repaid. The conductor certainly had no authority under any reasonable rule to eject the passenger and *keep the money*. The stopping of the train and the actual amotion of plaintiff were parts of a single act by which the servants of the defendant asserted a right to do that which they were not authorized to do while retaining plaintiff's money. If they could turn him out and then return the money he had paid, they could turn him out and not return the money at all. Indeed, it was argued by counsel for respondent that the servants of respondent possessed such power, and that the only redress to which plaintiff could resort was an action *for money had and received*. The whole matter was made to turn in the court below upon the hidden purpose of the conductor. Though the amount paid was paid by the plaintiff as and for his fare, and although the conductor received and pocketed the amount paid, still, if he did not *intend* to accept it as *full fare*, he had the right (as the jury were instructed) to confiscate the sum paid to the public use—or for his own benefit, or to that of his employers—and exclude the man who paid it from the cars. The question was not whether the plaintiff and defendant entered into a special agree-

ment whereby plaintiff was to be transported for the sum paid, but whether plaintiff had a right so to consider it until his money was repaid, and whether until that event the agent of defendant was justified in ejecting plaintiff. The jury was told that unless the conductor, who received the money, received it with the specific intent that it should constitute full payment for the service then being performed by defendant, "he had a right to put plaintiff out without returning the money"—"without offering him the said two dollars, or any part thereof."

If the conductor had demanded and received the two dollars as and for the full fare, or had agreed to transport the plaintiff for that sum, it is clear the latter could not have been ejected for non-payment of his fare. Yet the jury were told that "if the minds of the parties met upon one common proposition" to the effect that the two dollars were paid and received by the conductor as the full fare, the latter could not eject the plaintiff without first returning the money; thus intimating that he could turn him out if he first returned that which had been received as full fare. This charge certainly tended to confuse the jurymen.

Judgment reversed, and cause remanded for a new trial.

ROSS, J., and MCKEE, J., concurred.

[No. 5,908.—Department No. 1.]

ESTATE OF CROSBY.

ESTATES OF DECEASED PERSONS—FINDINGS.—Whenever issues of facts are tried by the Probate Court, findings of fact are proper.

ID.—CLAIMS.—E. P. R., administrator of an estate, presented to the Probate Judge, for allowance, a claim against the estate, based, in part, upon a promissory note executed to him by the deceased, and, in part, upon a judgment against the deceased in favor of one E. R., of which E. P. R. was the equitable owner, but of which no assignment had been made to him, and the claim was allowed by the Judge. Upon a subsequent application for the sale of real estate, it was objected to the claim, that the judgment had never been assigned to E. P. R., and that the claim was not accompanied by a certified or other copy of the judgment. *Held*, that the claim was properly presented in the name of E. P. R., and that under the law as it stood, at the time it was presented, it was not necessary that it should be accompanied by a copy of the judgment.

ID.—SALE OF REAL ESTATE—LAPSE OF TIME—LACHES.—Courts of Probate have the power, and it is their duty, to refuse an order for the sale of real

estate, where there has been such delay in making the application as to amount to laches. So *held*, (upon the facts stated in the opinion) in a case where seventeen years had elapsed from the date of the allowance of claims before the application was made.

ID.—ID.—STATUTE OF LIMITATIONS.—A proceeding in the Probate Court for the sale of real estate is perhaps "a special proceeding of a civil nature," and, as such, subject to the limitation prescribed by § 363, Code of Civil Procedure; but *held*, unnecessary to decide the question.

APPEAL by the widow and heir of deceased, from an order of sale of real estate in the Probate Court of the County of Santa Clara. PAYNE, J.

S. F. Leib, for Appellants.

No assignment of the judgment was made by Elliot Reed. It could only be presented in his name. (*Marsh* v. *Dooley*, April Term, 1877.) The judgment should have been authenticated either by the judgment itself or a certified copy. (Probate Act, § 141.)

A claim against an estate must be deemed stale after it becomes seventeen years old, and no excuse is shown why it was not enforced earlier. (*Beckett* v. *Selover*, 7 Cal. 240.)

A judgment against a living person can only be enforced after five years. By analogy the time should not exceed that time in any case. (*Ricard* v. *Williams*, 7 Wheat. 119.) The decisions are uniform that such a delay is unreasonable, and such claims are deemed stale, and enforcement refused. (*Mooers* v. *White*, 6 Johns. Ch. 360; *Scott* v. *Hancock*, 13 Mass. 162; *Ex parte Allen*, 15 id. 58; *Boyle* v. *Forbes*, 9 Tex. 41; *Fisk* v. *Norvell*, id. 14; *Blair* v. *Cisneros*, 10 id. 45; *Chandler* v. *Hudson*, 11 id. 37; *Hart* v. *Horton*, 12 id. 285; *McGreal* v. *Jones*, 36 id. 673; *Woolfolk* v. *Beatly*, 18 Ga. 520; *Gilchrist* v. *Rea*, 9 Paige Ch. 73; *Estate of Godfrey*, 4 Mich. 308; *Ferguson* v. *Broome*, 1 Bradf. 20; *McCrary* v. *Tasker*, 41 Iowa, 255; *Wolf* v. *Ogden*, 66 Ill. 224; *Hall* v. *Woodman*, 49 N. H. 295; Roper on Jud. Sales, 99.) It was proper for the Court to make findings. (*Coveny* v. *Hale*, 49 Cal. 555.)

Houghton & Reynolds, for Respondent.

No finding of facts are authorized in this proceeding, (Code, § 1518) and if the petition is sufficient it will be affirmed, unless

attacked by a statement or bill of exceptions. (*Wetherbee* v. *Carrol*, 33 Cal. 549.) No claim can become stale while it is pending in Court. (*Estate of Schroeder*, 46 Cal. 304.) The cases cited by appellant's attorney were decided in States whose statutes are materially different from those of this State. E. R. Reed was the equitable owner of the judgment.

McKINSTRY, J.:

This is an appeal by the widow and child of the deceased from an "order of sale of real estate" of the late Probate Court for Santa Clara. We think when "issues of fact" were tried by the Probate Court, "findings" were proper. (Code Civ. Proc. §§ 1713, 1714, 1715, 1716.)

It is urged by appellants that the allowance by the Probate Judge of the claim presented by *Edward P. Reed* was improper, in so far as that claim included an alleged judgment in favor of *Elliott Reed* against Samuel J. Crosby, the decedent, for the following reasons: First, no assignment had been made by Elliott to Edward P. Reed; second, the judgment was not properly authenticated. The finding on the subject is as follows:

"On the 28th day of September, 1859, the said Edward P. Reed presented to the Probate Judge of said county for allowance a claim against said estate, which was based upon a promissory note made by said Samuel J. Crosby to said Reed on the 1st day of November, A. D. 1857, for $950, payable one day after date, with interest thereon from date until paid at the rate of two and one-half per cent. per month, and also upon a judgment rendered March 23d, A. D. 1858, in favor of Elliott Reed, and against the said Samuel J. Crosby, in the District Court of the Third Judicial District in and for the County of Santa Clara, for the sum of $2,587.50, with interest thereon from the date of its rendition until paid at the rate of two and one-half per cent. per month, together with all costs incurred by said Reed. Said claim was allowed by the Probate Judge the day on which it was presented, and a copy of which, with the indorsement thereon, is hereto annexed, marked Exhibit A, and made a part hereof

"Exhibit A. The estate of Samuel J. Crosby to E P. Reed, Dr. To a note of hand of which the following is a copy:

"'$950.00. One day after date, for value received, I promise to pay Edward P. Reed or order, the sum of nine hundred and fifty dollars, with interest on the same from date until paid, at the rate of two and one-half per cent. per month.

"'(Signed) SAMUEL J. CROSBY.

"'SAN JOSE, November 1st, 1857.'

"Also to a judgment rendered March 23d, 1858, in favor of Elliott Reed, and against Samuel J. Crosby, for the sum of $2,587.50, with interest thereon at the rate of two and one-half per cent. per month from the 23rd of March, 1858, until paid, together with all costs accrued by said Reed.

"Said judgment being rendered in the District Court, in the County of Santa Clara.

"State of California, County of Santa Clara, ss.—I, Edward H. Reed, do solemnly swear, that the note above referred to of nine hundred and fifty dollars, together with the interest thereon, and the judgment above referred to of twenty-five hundred and eighty-seven dollars and fifty cents, together with the interest thereon, are justly due to me from the estate of Samuel J. Crosby, deceased; that no payments have been made thereon, and that there are no offsets to the same to my knowledge.

"EDWARD P. REED.

"Subscribed and sworn to this 28th day of September, 1859.

"JOHN H. MOORE, County Judge.

"State of California, County of Santa Clara, ss.—The within claim of Edward P. Reed against the estate of Samuel J. Crosby was presented to John H. Moore, Esq., Probate Judge for the County of Santa Clara, for his allowance this, the 28th day of September, 1859, and allowed by me.

"JOHN H. MOORE, Probate Judge.

"Indorsed: Filed December 5th, 1859.

"JOHN B. HEWSON, County Clerk."

Other findings show that the judgment referred to was, in fact, rendered, but do not show that the original record of any transcript thereof was presented to the Probate Judge. It is also found that the judgment was rendered upon a promissory note executed by Samuel J. Crosby to Elliott Reed; that the money

for which said note was given was the money of E. P. Reed, and no "assignment" of said judgment was ever made by Elliott Reed to E. P. Reed.

If E. P. Reed, the administrator, had an equitable interest in the judgment, the propriety of its presentation to the Probate Judge, and not to him, is manifest. No man should be a judge in his own cause. The allowance was of the judgment in favor of Elliott Reed. That the claim was presented by E. P. Reed, even as a portion of one "claim," which included the judgment, and also a note from deceased to E. P. Reed, does not change the effect of the allowance. Nor is it changed by the circumstance that in the affidavit of E. P. Reed, which accompanied the *claim*, the latter swore that the amount of the judgment was "justly due" to *him*. The statute did not require the claim based on the judgment to be *verified*. Elliott Reed ought not to be deprived of the benefit of the allowance by any of these circumstances. In *Marsh* v. *Dooley*, 52 Cal. 232, the note and mortgage were payable to *Darling*, or order, who was a resident of the county in which the letters of administration were issued; the note and mortgage remained in his possession, unassigned, until after the expiration of the time specified in the notice to creditors for the presentation of claims, without presentation. It was held that one who claimed an equitable interest in the note and mortgage could not subsequently present them. The difference between that case and the present is apparent. Here the claim, if properly presented at all, was presented within the time fixed by the notice, and presented by one whose authority to present is not contested by Elliott Reed—the fact of presentation being for *his* benefit.

Was the judgment ever presented as required by law? In the "objections" or answer of Evelyne C. Crosby, the widow, to the petition for the sale of the real estate, it is alleged: "Said judgment never was a legal charge or legally allowed against said estate, because, among other reasons, *neither it*, nor a certified nor any copy thereof was ever presented to the administrator of said estate, or to the Probate Judge of said county, or at all."

As the law stood when the claim was presented by E. P. Reed to the Probate Judge, in 1859, while it was required that "nec-

essary vouchers" should be exhibited to the administrator when the claim was presented, it was not requisite, if the claim was founded on a bond, bill, note or other instrument in writing, that the original should be presented and the allowance or rejection indorsed thereon or attached thereto. (Probate Act of 1851, § 131, Laws 1851, p. 464.) Nor was it necessary when a judgment had been rendered against the testator or intestate in his lifetime, that a certified copy of the judgment should be presented to the executor or administrator *as part of the claim*, although, doubtless, it was the duty of the executor or administrator to require evidence or vouchers sufficient to establish to his satisfaction the justice of every claim. (Id. § 141.) The requirements that original written obligations and certified copies of judgment should constitute the claims presented, or portions of them, are first found in subsequent amendments of the Probate Act. (Hittell's Gen. L. pp. 881, 2, 3, and 4.) When, therefore, the claim was presented to the Probate Judge, the portion of it relating to the judgment might properly consist only of a statement of the material parts of the judgment. It was the duty of the Judge to require proper and sufficient evidence of the existence of the judgment, and it must be presumed that he did. If he had erred by allowing the claim upon insufficient evidence, this would not have deprived his *allowance* of its *prima facie* quality as evidence of the validity of the claim. He was intrusted by law with the discretion of ascertaining, in the first instance, whether a claim was well founded. The *claim*, allowed or disallowed, constituted the record of his judicial action. The hearing with respect to the validity of a claim, (allowed by the administrator or Probate Judge) at a subsequent stage of the proceedings, when the heirs for the first time became parties, was not in the nature of a review upon appeal of the action of the administrator or Probate Judge. The final recognition of a claim as valid in no way depended upon the question whether the administrator or Probate Judge allowed it upon insufficient evidence. The law simply made the allowance *evidence prima facie* of the claim, and cast the *onus* of proof upon the heir contesting the claim; in other respects the investigation at the return of the application for an order of sale was an original trial, in which the heir first had a standing in Court. It fol-

lows from what has been said that it is immaterial whether the original judgment in favor of Elliott Reed, (if that could be possible) or a copy of it, was presented to the Probate Judge when he allowed the claim based on that judgment.

The question which remains is, whether the Probate Court erred in granting the "order of sale" *seventeen years* after the claims were allowed by the Probate Judge. And herein is to be considered the question whether the Court had a discretion to reject the petition because of an unreasonable delay in presenting it.

In *Mooers* v. *White*, 6 Johns. Ch. 375, Chancellor Kent said, with reference to applications by executors and administrators for the sale of real estate under the law of New York: "I am not prepared to admit that the executor or administrator can at any time, in his discretion, apply for, and be *entitled* to an order for the sale of the real estate." * * * "The statute (1 N. R. L. 450–53,) declares that the executor or administrator, when he shall discover or suspect that the personal estate is insufficient to pay the debts, shall, 'as soon as conveniently may be,' make a just and true account of the personal estate and debts, * * and shall deliver such account to the judge of probate or surrogate of the county, and request his aid in the premises. The judge is then to make an order directing, by due public notice, 'all persons interested in the estate,' to appear and show cause why so much of the real estate, whereof the testator or intestate died seized, should not be sold, as will be sufficient to pay the debts. He is then, at the time and place appointed, to 'hear and determine the allegations and proofs of the executor or administrator, and of all other persons interested in the estate,' who make or offer any." * * * "And if, 'upon the examination,' he shall find the personal estate not sufficient to pay the debts, he shall direct the whole or part of the real estate to be sold.' * * * * "This is the substance of the provisions of the act upon the subject, and I infer from them that the law intended that the executor or administrator should make his application with due diligence, and in reasonable time, and if he does not, the judge or surrogate has from the nature of his judicial trust a discretion to reject the application. What is a reasonable time may be another question. All I mean at

present to say is, that the judge of probates or surrogate must be entitled to determine, in sound discretion, what is a reasonable time under the circumstances of the case, and to determine when the executor did first discover, or had ground to suspect, the insufficiency of the personal estate, and whether, *as soon as conveniently might have been*, he had made out an account and filed an inventory, and applied the assets in hand according to the requisitions of the statute. If he had been guilty of gross negligence or palpable *laches* on these points, he is clearly not in season within the meaning of the act, and the judge or surrogate ought not to permit him, or the creditor who prompts him, by this summary proceeding to sweep away the real estate of the heir. Other provisions of the law show the like necessity of diligence in the settlement of the estate of the testator or intestate. The executor and administrator are required to file their inventory within six months after they have assumed their trust; and after the expiration of one year and not before, they may be called on to pay legacies, and make distribution among the next of kin. The law presumes that by that time they have ascertained the amount of the debts and of the assets, and have made due provision for the creditors, and are in a condition to distribute the surplus. The legatees and next of kin are then entitled to sue; and, perhaps, it would not be going too far to say, that, under the sound construction of the statute, and the pressing diligence which the provisions I have referred to evidently inculcate, the executor or administrator ought to be ready to apply, and ought to make his application within one year after he has entered upon the trust; and that every subsequent application, unless under peculiar circumstances and with some reasonable cause for delay, may, consistently with sound discretion and the spirit and policy of the act, be adjudged out of season and rejected." * * * * "All the analogous cases in the law show that these public trusts, created for the benefit of creditors, are to be executed promptly," etc.

The statute of this State, in operation when the "claims" to satisfy which the sale of real estate was ordered in the case before us were allowed, contemplated a prompt settlement and distribution of the estates of deceased persons. Section 73 of the "Probate Act" provided that the penalty of the bond of the ad-

ministrator should be for twice the probable value of the *annual* rents, profits, and issues of the real property belonging to an estate. Section 128 required that the administrator should, "immediately after his appointment," cause to be published a notice requiring all persons having claims against the deceased to exhibit them to the administrator "within ten months after the *first publication* of the notice." Section 228, that the administrator should render a full account and report of his administration "upon the expiration of one year from the date of his appointment." Section 243, that on the settlement of such account the court should make an order *for the payment of the debts*, or, in case there were not sufficient funds in the hands of the administrator, that the decree should specify the sum to be paid to each creditor. Section 247, that if the whole of the debts should have been provided for by the order last mentioned, and paid, the court should proceed to direct the payment of legacies, and *distribution of the estate* among the heirs, legatees, and other persons entitled; but if there should be debts remaining unpaid, the court should give such extension of time as might be "reasonable" *for a final settlement of the estate*. Contingent, disputed, and immature claims were provided for, so as not to prevent a speedy settlement. (§§ 244–6.) Section 154 provided, "when," (that is to say, in view of the plainly indicated policy and intent of the system, "so soon as it shall appear that") the personal estate was insufficient to pay the allowance to the family, and all the debts and charges of the administration, the administrator should sell real estate upon the order of the judge. It appears also that, if the executor or administrator neglected to apply for an order of sale when it was necessary, "any person interested in the estate" might make application therefor "in the same manner as the executor or administrator"—notice being given the executor or administrator. This language clearly includes the *creditors*. (§ 164.) Ever since *Beckett* v. *Selover*, 7 Cal. 215, it has been held that on an application to sell the real estate, the heir may dispute the validity of the claims on which the petition is based, although they have been allowed by the executor or administrator and Probate Judge; and that, under our system, the petition to sell real estate is a substitute for an action against the

heir, who must be cited, and has a right to be heard. As we have seen, the heir then first has his day in court, and except that, by a statutory rule of *evidence*, the "*allowance*" proves the validity of the claim *prima facie*, the proceeding is in its nature an original proceeding. It is manifest that the administrator or creditor ought not to delay an unreasonable time, since every consideration arising from the probable loss of evidence by reason of lapse of time, is applicable to a long delay preceding the petition for the sale of real estate, which is applicable with respect to *laches* in any other legal proceeding.

The Supreme Court of Michigan, in the *Matter of the Estate of Gabriel Godfrey, deceased*, 4 Mich. 314–15, after considering the question of delay in connection with peculiar provisions of the statute of the State, quote from the opinion of the Chancellor of New York in *Mooers* v. *White*, and add: "Applying the rule contained in the above citation—and its soundness, we think, cannot be controverted—we find no difficulty in dismissing the application (for the sale of real estate) on the sole ground of *laches*, without reference to the interests, claims, or liabilities of either the creditors or the different persons who, at different times, have represented the interests of the estate." In the same case it is said: "The power of the court to grant license to sell real estate, in cases of this character, is always discretionary, and it will never be exercised in any case when, by so doing, substantial injustice will be done, or, more properly, when substantial justice does not require it; and the application should be made within a reasonable time." It would be the extreme of hardship, if not of injustice, to allow, at this late day, the heirs and their grantees to be disturbed in the quiet and peaceable possession of the property in question. If the Statute of Limitations does not apply in this case, nevertheless, in the exercise of this discretionary power, we are not to overlook the evident intention of the law. By the statutes above cited, it clearly appears that the intention of the Legislature was to compel the executor or administrator, when it became necessary, to resort to these means to settle up an estate, to move at his earliest convenient opportunity."

Under our law, no action can be maintained against the heir for any debt of the ancestor, whether *specialty* or otherwise,

and every claim against an estate must be presented to the executor or administrator, as required by the Code of Civil Procedure, or it is forever barred. (Sec. 1493.) And such has been the law since the adoption of the Probate Act of 1851. When the liability of the heir to an ordinary suit by the creditor has continued, inasmuch as the heir has the right to set up the Statute of Limitations as against an action brought directly against him, he retains the right to assert the bar of the statute against an application by an executor or administrator for the sale of real estate in the Probate Court—since the "allowance" by the executor or administrator does not convert a simple promise into a *specialty*, nor amount to an admission on the part of the heir such as will take the claim out of the Statute of Limitations, nor in any other way affect the rights of the heir, beyond making the allowance *prima facie* evidence of the validity of the claim. (*Ferguson* v. *Broome*, 1 Brad. 19.) But while, under our system, the Statute of Limitations may not apply, every consideration arising from the evident intention of the statute that proceedings for the settlement of the estate should progress with all reasonable dispatch, and that the Probate Judge should employ a discretionary power to deny a petition for the sale of real estate where unreasonable delay has occurred, should have full force and vigor. These considerations should have the same influence—whatever the machinery provided by statute—whenever the intent referred to is made manifest by the language of the law. When from the statute it appears to be the duty of the executor, or administrator, or *creditor*, to apply as soon as conveniently may be, for the sale of real property—no specific period being prescribed within which the application must be made—the Probate Court, from the very nature of the trust confided to it, must determine the question of reasonable time. "So far as the express letter of the law stood, the proceeding might be commenced at any time. It was evident, therefore, that unless some equitable restriction was imposed upon the exercise of so broad a discretion, the power of the creditor, through the medium of the personal representative (or directly) to reach the real estate, constituted, in the vigorous language of Chancellor Kent, a 'hidden and tremendous lien' of the most dangerous character." (*Ferguson*

v. *Broome*, *supra*.) Fourteen years was declared to be "an unreasonable length of time" to delay making the application. (*Jackson* v. *Robinson*, 4 Wend. 442.) It would appear that the limitation of three years, within which an application must be made, provided by the Revised Statutes of New York, was imposed "in conformity to the suggestion of Chancellor Kent, in 6 John. Ch. 360." (*Ferguson* v. *Broome*, citing reviser's notes.)

It may be freely admitted that purchasers of real property from the heirs of a decedent, under our system in California, always have the opportunity (when the estate has not been finally closed) of ascertaining the existence of every claim which may be made a lien upon the real estate, and collected by a sale thereof. As every claim not presented and allowed by the executor, or administrator, or judge of probates, is *barred*, the purchaser may know by reference to the records of the Probate Court the condition of the estate in that regard. But while this is true, the pressing urgency of the provisions of the statute to which we have referred, and which is indicated by the whole scheme established for the settlement of estates of decedents, calls for a construction which as clearly requires the application for the sale of real estate to be made "as soon as conveniently may be," as if those terms had been employed in the law. Nor does the fact that the heirs do not call for an accounting in the Probate Court, and for sale of real estate if necessary, constitute any excuse for the delay of the administrator or creditor. The proceeding for the sale of real property is hostile to the heirs, and there is no principle which makes it *their* duty to initiate a suit adversely to themselves, the failure to commence which by the proper party may result to their benefit.

The laws of *Iowa* provide that claims not filed and proved within one year and a half of the giving of notice of the appointment of an executor, were forever barred, unless the claim was pending in court, or unless certain circumstances entitled the claimant to equitable relief. The Supreme Court of Iowa held, that, as a general rule in that State, an application of the executor to sell real estate of the decedent for the payment of debts would not be sustained unless made within *eighteen months*

from the time the executor gave notice of his appointment, ununless the peculiar circumstances of the case are of such character as to make it the duty of a Court of Equity to depart from this general rule, and that, under such circumstances, the application must be made within a reasonable time. The Court added: "If we could even hold that the circumstances are such as would justify the extension of the time for making the application beyond the lapse of eighteen months, still we are of the opinion that the delay of eleven and one-half years, without excuse or explanation, is unreasonable." (*McCrary* v. *Tasker*, 41 Iowa, 255.) By the Supreme Court of Illinois, it was held, that, while there was no statute of limitations barring proceedings by administrators for the sale of lands to pay debts, yet the right to sell the real estate of a deceased person for such purpose would be barred after the lapse of seven years, unless the delay could be satisfactorily explained; and in this respect each case must rest upon its own peculiar facts. (*Wolf* v. *Ogden*, 66 Ill. 224.)

A full examination of the foregoing and other cases, in which it was admitted that the Statute of Limitations did not apply, will show it to have been held, nevertheless, from the very nature of the proceedings and the character of the duties imposed upon courts where the estates of deceased persons are administered, as well as from the various provisions of the statutes of different States, which—however they may differ in detail—are all impressed with an evident legislative intent that the proceedings shall be promptly inaugurated and continuously prosecuted, without unnecessary delay; that the courts of probate retain the power, and it is their duty, to refuse an order granting leave to sell, when the delay amounts to *laches*.

We can see nothing in the facts appearing in the findings which can be held to excuse the delay of seventeen years which occurred in this case. In respect to all the claims allowed, except the judgment in favor of Elliott Reed, no reason whatever appears why, if the personal property was insufficient, an application should not have been made many years ago for the sale of real property. In respect to the judgment, it is found that on the 21st of March, 1861, about seventeen months after the allowance by the Probate Judge, E. P. Reed, after first obtain-

ing leave of the Probate Court so to do, caused a writ of execution to be issued out of the District Court upon the judgment in favor of Elliott Reed, directed to the Sheriff of San Diego County. Under and by virtue thereof, and on the 10th day of May, 1861, said Sheriff sold, to satisfy said execution, interest, and costs, all of the undivided third of the Cuyamaca Rancho—said Reed becoming the purchaser; that he bid the full amount of the judgment, interest, and costs due at the time of sale; and the Sheriff returned the execution fully satisfied. That afterward, September 10th, 1862, the Sheriff executed and delivered to E. P. Reed, as such purchaser, a sheriff's deed therefor. That doubts having arisen as to the validity of the execution and sale thereunder, the present administrator, and E. P. Reed, in August, 1876, submitted an agreed case to the Twentieth District Court, which Court on the 6th day of October, 1877, adjudged and decreed that said execution was issued without authority of law, and that the sale thereunder was *void*.

It would seem that the circumstances which can excuse a delay, otherwise unreasonable, must be such as arise out of the peculiar condition of the administration, and such as have prevented the executor or administrator from moving more expeditiously. Here the fact alleged, that the agent of the creditor mistook, for several years, the law of the land as to his right to proceed by execution upon the judgment of the District Court, can by possibility constitute no excuse for his failure to proceed in the Probate Court. It is a matter which has no connection with the progress of the administration, and his error as to the law may have coexisted, and did coexist for at least sixteen years, with the full power and opportunity to petition for a sale of the real property in the Probate Court. In any event we cannot conceive of a case in which a delay to petition for more than seventeen years after qualification of an administrator could be held to be reasonable.

We have not found it necessary to inquire whether any provision of our Statute of Limitations is applicable, in terms, to a proceeding of the character we have been considering. Neither of the counsel has claimed this; but on the contrary it was assumed by both that the statute did not apply. Since, however, it has been decided that a proceeding in the Probate Court is in

the nature of an original proceeding against the heirs, and such proceeding is simply statutory, and is not analogous to an action conducted according to the course of the common law, it may be perhaps "a special proceeding of a civil nature," and as such, subject to an appropriate section of the title of the Code of Civil Procedure which treats of limitations. (Code Civ. Proc. § 363.) It is not necessary to determine the question, however, and we content ourselves with saying that the delay preceding the filing of the petition was so great, in the absence of any satisfactory explanation, that the Probate Court ought to have dismissed the application or denied the order prayed for, and it was error to entertain the petition and to grant the order.

The order directing the sale of real estate, of the 24th day of November, 1877, is reversed, and the Court below is directed to enter an order dismissing the petition for the sale, or denying the order therein prayed for.

Ross, J., and McKee, J., concurred.

[No. 10,519.—Department No. 2.]

PEOPLE v. FERRIS.

ASSAULT WITH INTENT TO KILL—DRUNKENNESS AS JUSTIFICATION.—Drunkenness is never an excuse for crime, except where it is continued so long and been carried to such an excess as to produce *delirium tremens* or some other form of permanent insanity; but whenever the actual existence of a particular intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the intent with which he committed the act.

ID.—ID.—An instruction of the Court upon the trial of an indictment for an assault with intent to kill, to the effect that evidence of drunkenness on the part of the defendant, while clearly admissible under the law, should be received with great caution, *held*, not to be erroneous.

APPEAL from a judgment of conviction, and from an order denying a new trial, in the Superior Court of the County of Humboldt. HAYNES, J.

S. M. Buck, for Appellant.

Evidence of drunkenness was admissible upon the question of intent. (*State* v. *Wingo*, 66 Mo. 181; Pen. Code, § 22.)

The Court erred in instructing the jury that the evidence of drunkenness should be received *with great caution*. This was a charge upon the *weight* of evidence. (*Seligman* v. *Kalkman*, 8 Cal. 216; *Blackburn* v. *Com.* 12 Bush, (Ky.) 181; *Harris* v. *State*, 1 Tex. Ct. App. 74; *Grube* v. *Nichols*, 36 Ill. 92; *Fine* v. *St. Louis*, 30 Mo. 166; *Anderson* v. *Kincheloe*, id. 520.)

Attorney-General, for Respondent.

MORRISON, C. J.:

The appellant was convicted in the Superior Court of the County of Humboldt of the crime of an assault with a deadly weapon, with intent to kill and murder one James Mahoney, and was by that Court sentenced to five years' imprisonment in the State Prison.

1. The first point made before this Court is, that the verdict of the jury was against the evidence. The facts are few and simple, and are substantially as follows:

The defendant was the owner of a drinking-saloon in the town of Eureka, and being indebted to one J. P. Monroe, executed and delivered to Monroe a bill of sale therefor, and thereafter James Mahoney was put in charge of the saloon by said Monroe. About two hours later, in the same day, the defendant came to the saloon and asked Mahoney for the key, stating at the time that he wanted to lock up the saloon. Mahoney refused to surrender the key to him, and thereupon the defendant struck Mahoney with his fist. The language of the witness is: "He said he would have it, (the key) and he made a pass at me. I knocked it off, and the next time I got cut in the stomach; then I cleared out. * * * Then, I should judge it was about fifteen or twenty minutes after I went over to McGarraghan's, he hallooed to me. He was coming up by Buhne's store, when he hallooed to me, and told me he wanted the key. I told him as I did before, that I would not give it to him, and he made a pass at me again. * * * He made a lick at me, and I knocked it off with my arm, and then he drew his knife. He struck at me and I knocked it off, and then I struck him, and he came at me with his knife. He then cut me

in the side and twice in the head. I then ran off, and he chased me and overtook me. I then had to give him the key."

This is substantially the evidence in the case.. The witnesses do not precisely agree in their statements, but the evidence clearly establishes the guilt of the accused. The key was rightfully in the possession of Mahoney, and his refusal to surrender it constituted no just ground for the assault made upon him by the defendant.

We have said that the key was rightfully in Mahoney's possession, and therefore he very properly refused to let the defendant have it; but if the case had been otherwise—if the defendant had been justly entitled to its possession—the refusal to surrender it would have afforded no just or legal cause for the assault. The verdict was not contrary to the evidence, but was fully sustained by it.

2. The next ground of error alleged is that the Court misdirected the jury in giving, at the request of the District Attorney, the following instruction:

"6th. The defendant relies upon the fact that he was drunk as an excuse for his act, and claims that he was incapable of forming a criminal intent. The same rule of law should apply in cases of drunkenness as in case of insanity: that is, was the accused at the time of committing the offense conscious that he was doing wrong? And when drunkenness is relied upon as a defense and an excuse for crime, the burden of proof is upon the defendant to establish the fact of drunkenness to such an extent as that he was not conscious he was doing wrong, and this must be established on his part by satisfactory proof."

We are of the opinion that the foregoing instruction was erroneous, as it assumes that drunkenness is in some cases an excuse for crime, and places it on the same footing with insanity. Insanity, when it reaches that degree of mental disease that the party is not capable of knowing the nature or quality of the act, or if he did know it, that he did not know he was doing what was wrong, relieves him from all criminal responsibility.

Tindal, C. J., in answer to questions propounded by the House of Lords to the Judges, (cited in Roscoe's Cr. Ev. 953,) says: "that to establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act the

party accused was laboring under such a defect of reason, from disease of the mind, as not to *know the nature or quality of the act*, or if he did know it, that he did not know he was doing *what was wrong*." This is the rule adopted in this State. (*People* v. *Coffman*, 24 Cal. 230.) The burden of proving insanity rests upon the defendant, and its existence must be satisfactorily established by a preponderance of evidence. (*People* v. *Myers*, 20 Cal. 518.)

If, therefore, it could be claimed that the plea of drunkenness is the same in law as the plea of insanity, and is governed by the same rules, the instruction given by the learned judge was correct. But drunkenness, as has already been stated, is never an excuse for crime except where it has continued so long and been carried to such an excess as to produce *delirium tremens*, or some other form of permanent insanity. The instruction was therefore more favorable to the defendant than the rule, as we understand it, justified the Court in giving; but of this the defendant cannot complain.

In other instructions, the Court did, however, give the law correctly to the jury. The jury were told by the Court that in order to find the defendant guilty of the crime charged against him, they must be satisfied of his guilt, from the evidence, to a moral certainty and beyond a reasonable doubt. They were further instructed that they might take into consideration the fact that the defendant was drunk at the time of the commission of the act charged, to determine the fact whether the accused was too drunk to have formed the criminal intent necessary to hold him responsible before the law. The eighth instruction given by the Court to the jury was the following:

"If you believe that the defendant was in a state of intoxication at the time of the alleged assault, I charge you, that while drunkenness is no excuse for any crime whatever, yet, as before stated, it is of very great importance in cases where it is a question of intention, and a person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence."

The above instruction was certainly as favorable to the accused as he had a right to ask. The Court of its own motion pro-

ceeded to charge the jury at greater length on the question of drunkenness, and among other things charged as follows:

"No act committed by a person when in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent, is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent, with which he committed the act. * * * Evidence of drunkenness is only admitted for the purpose indicated in the preceding instruction, and may be considered by the jury as a fact bearing upon the question of the intent with which the act was done."

The foregoing extracts from the charge of the Court below bring the case within the rule laid down by this Court in the case of *The People* v. *Williams*, 43 Cal. 344. In that case the law was stated to the jury as follows:

"It is a well-settled rule that drunkenness is no excuse for the commission of crime. Insanity, produced by intoxication, does not destroy responsibility, when the party, when sane and responsible, made himself voluntarily intoxicated; and drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for this purpose it must be received with great caution." Referring to this instruction, Wallace, C. J., says: "The fifteenth instruction given to the jury, as to insanity produced by intoxication, is correct. It is the same which was approved here in *People* v. *Lewis*, 36 Cal. 531."

3. The third and last point made on behalf of the appellant, is that the Court below erred in charging the jury, as follows:

"Evidence of drunkenness on the part of defendant, while clearly admissible under the law, should be received by the jury with great caution."

There was no error in the above admonition, as has already

been shown by the last two cases referred to, and as will also appear from an examination of the more recent case of the *People* v. *Bumberger*, 45 Cal. 650.

Judgment and order affirmed.

MYRICK, J., and SHARPSTEIN, J., concurred.

[No. 6,384.—Department No. 2.]

JAMISON ET UX. *v.* THE SAN JOSE & SANTA CLARA RAILROAD COMPANY.

CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.—When the negligence of the injured party contributes directly to the injury complained of, the law will afford no redress; but negligence is not absolute or intrinsic, but always relates to some circumstance of time, place or persons, and whether there was contributory negligence in any given case, is generally a question for the jury to pass upon or determine.

NEGLIGENCE — DEFINITION. — Negligence is the omission to do something which a reasonable man, guided by those circumstances which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable and prudent man would not do.

ID. —COMMON CARRIERS OF PASSENGERS. —Common carriers of passengers are required to do all that human care, vigilance, and foresight can, under the circumstances, in view of the character and mode of conveyance adopted, to prevent accidents to passengers, and they are responsible for any, even the slightest, negligence.

APPEAL from a judgment for the plaintiff in the Twentieth District Court, County of Santa Clara. BELDEN, J.

S. F. Leib, for defendant:

Cited *Fleming* v. *W. P. R. R. Co.* 49 Cal. 257; *Deville* v. *S. P. R. R. Co.* 50 id. 383; *R. R.* v. *James*, 5 Otto, 443; *Fox* v. *Glastenbury*, 29 Conn. 204; *The Ship Anglo-Norman*, 4 Saw. C. C. Rep. 188; *R. R. Co.* v. *Houston*, 5 Otto, 702; *Forsyth* v. *B. & A. R. R. Co.* 103 Mass. 510; *Matthews* v. *St Louis Elevator Co.* 59 Mo. 474; *Gribble* v. *Sioux City*, 38 Iowa, 390.

J. C. Black, and *Lampkin & Thomas*, for Respondents.

Upon the issues as to negligence the evidence was conflicting, and the verdict should not be disturbed. (*Blood et ux.* v. *Tyngsborough*, 103 Mass. 509.)

MORRISON, C. J.:

This action was brought to recover damages sustained by the plaintiff, Mary E. Jamison, while a passenger on defendant's road, and a trial having been had in the late District Court, of the Twentieth Judicial District, judgment passed in favor of the plaintiffs for the sum of $300 damages, from which judgment the appeal in this case was taken.

It appears from the evidence that in the month of September, 1876, the city of San José was causing Los Gatos Creek to be widened at a point where it is crossed by defendant's road; that an excavation was made on the east side of the creek, leaving the bridge spanning the creek propped and still standing; that at the time the excavation was twenty feet wide, leaving for that distance a chasm twelve feet deep, between the edge of the east bank and the east edge of the bridge, over which there were no means of passage, except upon the railroad track, which was undermined and had been propped up, and boards laid along the rails, but over which the cars did not and could not pass. As a part of the means used and adopted by the defendant for the transportation of its passengers across the chasm above referred to, defendant laid a line of planks between the rails, extending from end to end across said creek, and filling the space between the rails, but without a railing on either side thereof. There was a log 10x10 inches lying across the east end of the plank-way, which three men could have removed. On the night of September 17th, 1876, while the road was in this condition, the plaintiff, Mrs. Jamison, took passage as a passenger, on defendant's car, in the city of San Jose, at a point about a mile east of the bridge. This was at 9 P. M., and the car arrived at the bridge at 9.10 P. M.

Mrs. Jamison testified as follows: "The car went as far as the creek, and then the driver threw open the door and told us to change cars. I started across the plank-way, which was twenty feet long. It was so dark I could not see where I was

stepping. There were no guards along the plank-way, and no lights except in the car I had just vacated, and in the car on the other side of the creek, and one on the other end of the bridge, at the center of the roadway. None of these threw any light on the plank-way, or made it possible to see it. I made one step on the plank-way, and the next I went over and fell to the bottom of the excavation. I fell over because it was so dark. I could not see where I was stepping. I had passed over the plank-way several times before in daylight, and knew just exactly how the track was then, and how it was planked. I had crossed it that evening going into town, before it was dark. I was badly hurt." This statement of plaintiff was corrobated by many witnesses.

Hattabaugh, a witness for plaintiffs, testified that he was following Mrs. Jamison across the plank-way, and feeling his way with his cane, and had he not seen her fall, he thought he might have fallen himself.

There was no pretense that Mrs. Jamison called for a light or guide, and the testimony showed that she did not.

Plaintiffs also proved that the passengers transported upon defendant's cars were in the practice of passing across the plank-way for the purpose of taking the cars at either side of the chasm, and that this fact was well known to defendant and its agents.

The defendant produced witnesses who testified that the road and pathway across the bridge was suitably and sufficiently lighted, so that persons with ordinary care could readily see to cross the same.

The foregoing is substantially the evidence in the case as presented by the bill of exceptions. When the evidence was closed, the defendant, by its attorney, requested the Court to direct the jury to find for the defendant, which direction the Court refused to give, and thereupon defendant excepted. Verdict for plaintiffs.

The only point presented for our consideration on this appeal is, that there was such contributory negligence on the part of Mrs. Jamison as to defeat plaintiff's right to a recovery.

The general doctrine is perfectly familiar to us, that when the negligence of the injured party contributes directly to the

injury complained of, the law will afford no redress; and this principle is fully sustained by the authorities referred to by the learned counsel for the appellant. But negligence is a relative term, and is defined to be "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Moreover, it is not absolute or intrinsic, but always relates to some circumstance of time, place, or persons." (Broom's Legal Maxims, 329; *Richardson* v. *Kier*, 34 Cal. 75.) And the question whether there was contributory negligence in any given case, is generally one for the jury to pass upon and determine. "The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find. It can very seldom happen that the question is so clear from doubt that the Court can undertake to say, as matter of law, that the jury could not fairly and honestly find for the plaintiff. It is not the duty of the Court in such cases any more than in any other, to usurp the province of the jury, and pass upon the facts. And the nonsuit should only be granted in such cases where the evidence of the misconduct on the part of the injured party is so clear and irresistible as to put the case on a par with those cases where a nonsuit is granted for a failure to introduce evidence sufficient to go to the jury upon some point essential to the plaintiff's case. The fact must be so clear that, looking upon the plaintiff's case in the most favorable light, and giving him the benefit of all controverted questions, the Court can see that a verdict in his favor must necessarily be set aside." (*Schierhold* v. *N. B. & M. R. R. Co.* 40 Cal. 447.)

In the case now under consideration, it is claimed, on behalf of the appellant, that the evidence clearly shows contributory negligence on the part of Mrs. Jamison, for the reason that she was familiar with the condition of the road at the point where she was injured; that it was very dark, according to her own statement, and that it was her duty, in the exercise of ordinary prudence, under the circumstances, to have called upon an employé of the company for a light. This we understand to be the argument in favor of the appellant, and the ground taken

by the defendant in the court below in support of its motion for a nonsuit, or, what was more than the equivalent of a nonsuit, to wit, a direction to the jury to find a verdict in favor of the defendant.

This brings us to the question: Was it *per se* contributory negligence on the part of Mrs. Jamison to attempt to walk on the structure erected by the defendant for the transfer of passengers from one of its cars to the other? To our minds, and in the view we take of this case, it is an important fact, that the defendant was a common carrier, and the plaintiff, Mrs. Jamison, was a passenger for hire on its line of road. The duty imposed by the law on common carriers is very clearly laid down both in text-books and in the reports. We will refer to a few authorities on the subject:

"In the next place they are bound to provide careful drivers, of reasonable skill and good habits, for the journey; and to employ horses which are steady, and not vicious or likely to endanger the safety of the passengers. In the pithy language of an eminent judge, it may be said, that 'the coachman must have competent skill; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made, *and also with lights by night.* If there is the least failure in any of these things, the duty of the coach proprietors is not fulfilled, and they are responsible for any injury or damage that happens.'" (Story on Bailments, § 593.)

"They are bound to make use of all the ordinary precautions for the safety of passengers on the road. This involves the consideration of the duties of the coachman in driving on the road. If he is guilty of any rashness, negligence, or misconduct, or if he is unskillful, or deviates from the acknowledged custom of the road, the proprietors will be responsible for an injury resulting from his acts. Thus if the coachman drives with reins so loose that he cannot govern his horses, the proprietors of the coach will be answerable. *So, if there is any danger in any part of the road, or in any particular passage, and he omits to give due warning to the passengers.*" (Story on Bailments, § 598.)

"Common carriers of passengers are required to do all that

human care, vigilance and foresight reasonably can, under the circumstances, in view of the character and mode of conveyance adopted, to prevent accident to passengers. To require anything less would be to leave the lives of persons in the hands of the reckless, and unprotected against the negligent and incautious." (*Tuller et al.* v. *Talbot*, 23 Ill. 357.) "It has been accordingly held, that passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go; that is, for the utmost care and diligence of a very cautious person, and of course they are responsible for any, even the slightest neglect." (Story on Bailments, § 601; *Fairchild* v. *California Stage Co.* 13 Cal. 604. See also *McElroy* v. *N. & L. R. R. Co.* 4 Cush. 400; Wharton on Negligence, § 658.)

It is unnecessary for us to pursue this inquiry any further, for the principles of law regulating the duties and liabilities of common carriers are clearly and correctly stated in the authorities already referred to. Let us apply those principles to the present case. Did the defendant exercise that high degree of care imposed upon it by the law? We are clearly of the opinion that it did not. There was a dangerous point in its road, and no such precautions were taken to prevent injuries to passengers as even *ordinary care*, prudence, and foresight dictated. The walk was a narrow one; there was no protection on either side of it; a large piece of timber was allowed to remain across it, and above and beyond all this, there were no sufficient lights to guide passengers in their transit from one car to another. It was its duty to have had the walk sufficiently lighted, and in its failure in this regard, it was unquestionably guilty of negligence. Nor do we think that there was such contributory negligence on the part of Mrs. Jamison as exempts the defendant from legal liability. It is claimed that she had crossed on the structure that afternoon. Suppose she had, it by no means follows that she was guilty of negligence in attempting the same feat in the evening. In the day-time the passage doubtless appeared easy and free from danger, and so it would have been in the night, if it had been properly lighted.

It is also claimed, on behalf of the appellant, that it was the duty of the passenger to call for lights, if none were supplied in

advance by the company. We do not think that the law imposed any such duty upon the plaintiff. She had a right to presume that whatever light was requisite to make the passage a safe one, would be provided by the defendant, and that the passengers in the car would not be sent out into the dark, at the risk of life and limb, to make a transit, which could so easily have been rendered safe by the use of ordinary care and prudence.

We are of opinion that the judgment of the Court below should be affirmed, and it is so ordered.

Judgment affirmed.

MYRICK, J., and SHARPSTEIN, J., concurred.

[No. 6,414.—Department No. 1.]

COOPERS v. MAYOR AND COMMON COUNCIL OF THE CITY OF SAN JOSÉ.

CONSTRUCTION OF STATUTE—"MAY"—DEFINITION.—In a proceeding for a writ of mandamus to compel the defendants to sell or fix the price of certain lots fronting on a new street opened through the Market Plaza of the City of San José, under the Act of March 4th, 1878, (Stat. 1877–8, p. 163) *held*, that the statute did not enjoin upon the defendants a duty to sell the lots in question, but simply conferred upon them the power to sell or not to sell, as they should deem best for the interests of the city.

APPEAL from a judgment for the plaintiff, in the Twentieth District Court. BELDEN, J.

Frs. E. Spencer, for Appellants.

The Act of March 4th, 1878, simply conferred upon the Mayor and Common Council the power to sell the land in their discretion, and, in case they should sell, to give the owners of adjoining lands the right of pre-emption. (*Harris* v. *Supervisors of San Francisco*, Jan. Term, 1878.)

George F. Baker, for Respondent.

The right of purchasing these lands was granted by the Legislature to the petitioner and all of his class. (*Montgomery* v.

Kasson, 16 Cal. 189; *Grogan* v. *San Francisco*, 18 id. 613; *Slaughter House Cases*, 16 Wall. (U. S.) 65; Cooley's Const. Lim. (4th ed.) pp. 346–7.

"May" means "must," and generally permissive language is mandatory, if individual rights require it to be so read. (*N. P. R. R. Co.* v. *Napa Co.* 30 Cal. 437; *People* v. *San Francisco*, 36 id. 595; *Estate of Ballentine*, 45 id. 696; *People* v. *San Luis Obispo*, 50 id. 573; *Supervisors* v. *United States*, 4 Wall. (U. S.) 445; *People* v. *Supervisors*, 51 N. Y. 405; *Mason* v. *Pearson*, 9 How. (U. S.) 259; 1 Dillon's Mun. Corp. § 62.)

That the language of § 2 was intended to be mandatory is clear from the remainder of the statute.

McKINSTRY, J.:

Market Street in San José ran from each end of "Market Plaza"—an enclosed ellipse of greenery, shaded by trees and traversed by gravel walks. On the 4th day of March, 1878, the Legislature passed an act entitled "An Act to ratify and confirm the acts of the Mayor and Common Council of the City of San José." (Stats. 1878–8, p. 163.) The body of the act is as follows:

"Section 1. The Mayor and Common Council of the city of San José are hereby authorized and empowered to open Market Street in said city, through the plaza known as Market Plaza. Said street shall be opened to the same width as other portions of Market Street contiguous to said plaza, to wit: fifty feet on each side of a line running through said plaza, said line to commence at a point in the center line of Market Street where said Market Street forms a junction with San José Street and Guadalupe Street, on the northerly side of said plaza, and running thence southerly through said plaza to a point in the center line of said Market Street where said Market Street forms a junction with San José Street and Guadalupe Street, on the southerly side of said plaza; the whole width of the street to be opened to be one hundred feet.

"Sec. 2. The said Mayor and Common Council, after the opening of said street, may sell the ground of the plaza fronting on either side of said street to parties who own lands around

said plaza and between their respective lots and said street, and said owners of land shall have the privilege of buying such portions of said plaza grounds as are in front of their lots, in preference to all others, provided they do so within the time prescribed by § 4 of this act. The price demanded for said land shall be based upon the actual value thereof, and not on the prices at which other lands belonging to said city have been heretofore sold. Said lands may be sold at either public or private sale, and the proceeds thereof shall be paid into the general fund of said city, and shall be used only for the purpose of building and maintaining public sewers in said city.

"SEC. 3. The Mayor and Common Council shall, after the passage of this act, direct the City Surveyor to survey said Market Street through said plaza, according to the description contained in this act, and also such cross street or streets as may come into or be connected therewith, and shall make plans, diagrams, and specifications of said survey, and present the same to the Mayor and Common Council of said city. Immediately upon the receipt of the plans, diagrams, and specifications of said survey, the Mayor and Common Council shall order the Street Commissioner to proceed at once and open said street, and remove therefrom all fences and other obstructions which may hinder and impede travel thereon.

"SEC. 4. Those parties wishing and having the privilege of buying said plaza shall make application in writing to the Mayor and Common Council, and, after paying the purchase-money, the said Mayor and Common Council shall make deeds of conveyance to said purchasers; but if the parties owning land around said plaza shall fail, for a period of six months from the passage of this act, to make such application, then it shall be lawful for any person to make such application, and, by complying with the conditions of this act, such party shall be entitled to such conveyance."

On the 27th of January, 1878, the Common Council had passed an order to open Market Street through the plaza. Subsequently to the passage of the act above recited, the Mayor and Council directed the City Surveyor to survey and run the side lines of the street through the plaza; and—March 25th, 1878—passed an ordinance accepting and approving the survey, and

declaring the street opened. The petitioner, claiming to be the owner of one of the lots lying "around the plaza," applied in writing, within six months after the passage of the act, to the Mayor and Council, to purchase that portion of the plaza in front of his lot. On their refusal "to sell or fix the price," petitioner went to the District Court for a writ of *mandamus* to compel the Mayor and Common Council to proceed. This appeal is from the judgment of the District Court commanding the Mayor and Common Council, within ten days after service of the judgment, "to fix and *demand* a price for the land."

The statute does not specially and unconditionally enjoin a duty upon defendants to take the steps they were commanded to take by the judgment of the Court below. It simply confers power upon the Mayor and Common Council to sell, or not to sell, the portions of the plaza excluded from the street, as they shall deem best for the interests of the city. The primary purpose of the law was to "authorize and empower" the Council to extend Market Street through the *plaza*, or—if the previous action of the local government be considered—to ratify the attempted inauguration of proceedings intended to lead to the extension of Market Street through the plaza, and to authorize the completion of that work.

The word "may" in the second section might be read "shall" if it were necesaary so to read it to give effect to any clearly expressed intention of the act. But, reading the whole of the statute, it does not appear to have been the purpose of the Legislature to give to those owning lots opposite to the plaza the absolute right or privilege, within six months, to purchase for the "actual value" the lands lying between their lots and Market Street. Such persons—if they make application within six months—are merely given a preference over others, in case the tracts are offered for sale, for prices "demanded." An owner of property opposite the plaza acquired no vested interest in the land lying between his lot and Market Street immediately on the passage of the act; nor did petitioner acquire a vested right or property in such land merely by making the application within six months after the passage of the act. The act simply gave to him conditionally a personal preference over other persons who may desire to purchase a certain tract. The right to purchase

may be asserted by any person at any time after the lands are offered for sale, without limitation as to individuals, except that a class, of whom petitioner is one, have a preference if their intention to purchase shall have been indicated within a defined period. The Mayor and Common Council may sell, or may not sell, but if they conclude to sell, the price *demanded* shall be based upon actual value. The city authorities may be of opinion, in the exercise of their governmental discretion, that it is expedient to reserve the portions of the plaza on each side of Market Street as public grounds or parks; or that the property can at a future time be sold for higher prices; or that the *sewer fund* does not require the proceeds of such sales. Any delay in fixing prices and announcing a readiness to sell cannot interfere with the privilege—which we believe to be the only privilege accorded by the act to adjacent land-owners—of securing conditionally a pre-emptive right, in case the land shall ever be offered for sale. The scheme, beyond the opening of Market Street through the plaza, contemplates a grant of legislative power, which, if employed by the city government—in the exercise of the sound discretion of the local authorities—will result in fixing prices upon all of the lands which may be offered for sale. It is not to be presumed that it was intended that the determination of actual value should be reached *in court* in each instance where the city and applicant could not agree upon the price which ought to be paid. The statute requires that the Mayor and Council shall sell the portions of the plaza, not within the limits of the street, only in case they shall deem it expedient to sell; and further, in case they shall deem it expedient to sell, that they shall by ordinance fix the value, or provide a mode of fixing the value, of the lots they shall offer for sale. When the sum thus fixed with reference to any tract shall be tendered by the owner of the adjoining lot—in case he shall have filed his application within six months from the passage of the act—or by anybody else, (in case the adjoining owner shall not have made application within the period limited) it will become the duty of the city officers to convey.

There is nothing in the *second* or *fourth* sections of the act which forbids this interpretation. The owners have the privilege of buying "in preference to others," but this does not make

it the absolute duty of the city to sell. If an adjacent owner does not make "application" within six months, "any party" may make it, and, by complying with the conditions of the law, become entitled to a conveyance—but only in case the city shall conclude to sell.

Judgment reversed.

ROSS, J., and MCKEE, J., concurred.

[No. 6,756.—Department No. 2.]

LEWIS v. THE COUNTY CLERK OF SANTA CLARA COUNTY.

INSOLVENCY ACT OF 1876—BANKRUPT ACT—CONSTITUTIONAL LAW.—The existence of the United States Bankrupt Law did not render the Insolvency Act of March 31st, 1876, unconstitutional, but merely postponed its operation; and upon the repeal of the Federal law, the State act became operative in regard to debts arising after its passage, whether arising before or after the repeal of the Federal law.

PROHIBITION to the County Court of Santa Clara County.

Houghton & Reynolds, for the Plaintiff.

The passage, by Congress, of the general Bankruptcy Law of March 2nd, 1867, suspended the *power* of the State to deal with the subject. And the power of Congress, when exercised, excluded all State legislation as to the matters covered by the act of Congress; and the act of the Legislature of this State of March 31st, 1876, (Laws of 1875–76, p. 581) under which these proceedings were commenced, is void. (*Sturges* v. *Crowninshield*, 4 Wheat. 191–96; *Ogden* v. *Saunders*, 12 id. 213, 383, 369; *Martin* v. *Berry*, 37 Cal. 208; *Mather* v. *Bush*, 16 John. 232–249; *Boedfeld* v. *Reed*, 55 Cal. 299; Const. U. S. art. 1, § 8, subd. 4.) It is claimed by the learned counsel for respondent, that the Act of 1876 was, in view of the Federal statute, passed, to take effect on condition that and when Congress should repeal its act; and the case of the brig *Aurora*, 7 Cranch, 382, is relied on to support this view; but if the legislative *power* was suspended the Legislature could not act at all.

McKissick & Rankin, for Respondent.

In *Boedfeld* v. *Reed*, this Court decided that the Insolvent Law of this State was merely suspended while the Federal Bankrupt Law was in existence, and that it came into operation immediately upon the repeal of the Bankrupt Law taking effect.

The Act of 1876 is a part of that system. It is made so by its title, and clearly appears to be so by the terms of the 5th and 8th sections. The Legislature, knowing that the State insolvent system would *ex proprio vigore* come again into effect on the repeal of the Federal law, and desiring to have that system more complete, passed the Act of 1876, supplemental to the old system.

MYRICK, J.:

An alternative writ of prohibition was directed to the then County Court of Santa Clara County, to prevent it from proceeding further in an insolvency matter under the Act of March 31st, 1876. The claims of two of the petitioning creditors accrued after the passage of the State Bankruptcy Law, and before the repeal of the Federal Bankruptcy Law; and the petitioner in this case claims that the act of the Legislature of this State, having been passed while the Federal law was in existence, was not only inoperative during the existence of the Federal law, but is also inoperative after the repeal of the Federal law as to any claims arising before such repeal.

A State bankruptcy law is not *repealed* by the passage of a Federal bankruptcy law; its *operation* is suspended. This subject was considered in *Boedfeld* v. *Reed*, 55 Cal. 299; and the principles stated in that opinion, as well as the reasons of the case, seem to us to lead inevitably to the conclusion that the existence of a Federal law does not prevent the passage of a State law; it merely postpones its operation; and that upon the repeal of the Federal law, the State law, being in existence, becomes operative, as well in regard to debts arising after the passage of the State law, before the repeal of the Federal law, as in regard to

those arising after the repeal. (*Damon's Appeal*, Reporter, August 4th, 1880, vol. 5, p. 180.)

Writ discharged.

SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 6,624.—Department No. 2.]

GOLDEN GATE PACKING CO. *v.* FARMERS' UNION.

CONSTRUCTION OF CONTRACT—AGENCY—DEFINITION.—The plaintiff agreed with the defendant that the latter should have the exclusive *agency* for the sale of the plaintiff's productions east of the State of California, for one year, upon an agreed commission. *Held*, there was nothing in the agreement to prevent the plaintiff from *selling* his goods in any part of the world.

APPEAL from a judgment for the plaintiff, in the Twentieth District Court, County of Santa Clara.

Houghton & Reynolds, for Appellant.

D. M. Delmas, for Respondent.

SHARPSTEIN, J.:

This action was brought by the plaintiff to recover of the defendant $1,449, received by him to and for the use of the plaintiff. The answer admits the receipt of the sum specified, but alleges that it was received under an agreement between the plaintiff and the defendant, by which it was agreed that the defendant should have the exclusive agency for the sale of the plaintiff's productions east of the State of California, for the term of one year, from the 29th day of May, 1877, upon a commission of five per cent. on such sales. It also alleges that the plaintiff violated this agreement by selling some of its productions to other persons, to be sent to the States east of the State of California. The defendant introduced in evidence an agreement dated May 26th, 1877, between the plaintiff and Feusier & Bergham, in which the plaintiff agreed to furnish and sell to Feusier & Bergham such quantities of canned table fruit as they might order previous to July 1st, 1877, and there was ev-

idence introduced by the defendant tending to prove that under this agreement the plaintiff did sell and deliver to them a certain quantity of canned table fruit, which they sent to eastern markets, and that the plaintiff knew at the time of entering into said agreement with said Feusier & Bergham that they were purchasing said goods with the intention of selling them in said markets. The jury returned a verdict in favor of the plaintiff for the amount claimed in its complaint, and a judgment was thereupon entered, from which this appeal is taken.

The only question which arises upon this record is, whether the sale and delivery of goods by the plaintiff to Feusier & Bergham, with the knowledge that they intended to dispose of them in cities east of the State of California, constituted a breach of the plaintiff's agreement with the defendant, that it should have the exclusive agency for the sale of the plaintiff's productions east of said State. If it did, the Court erred in giving some of the instructions that it gave, and in refusing to give some which it was requested to give. Otherwise, the Court committed no error. We are unable to discover anything in the agreement which forbade the selling of its goods by the plaintiff to whomever would purchase them in any part of the world. It could not, under that agreement, establish any other agency than that of defendant for the sale of its goods east of the State of California. And there is no evidence tending in any degree to prove that it did. It is not stipulated that the defendant should have the exclusive sale of the plaintiff's goods within the territory mentioned, and there is nothing in the agreement from which we can infer that such was the intention of the parties. We do not think that there is any error in the instructions, and the judgment must be affirmed.

Judgment affirmed.

Myrick, J., and Morrison, C. J., concurred.

[No. 6,032.—Department No. 2.]

SULLIVAN *v.* BEARDSLEY.

EVICTION—DEFINITION—PENDENCY OF ACTION—JUDGMENT.—The defendant leased land to the plaintiff upon which there was a stream of water; and the next day, in an action commenced prior to the lease by the San José Water Company—in which, however, no notice of *lis pendens* had been filed—consented to a decree for the condemnation of the water, and the water company afterward appropriated the water of the stream. In an action for damages for the loss of the water, *held*, that, as the defendant's lease antedates the decree, and he had no notice, actual or constructive, of the pendency of the action, he was not affected by it; and that, as the defendant had not participated in the diversion of the water, or done anything beyond consenting to the entry of a decree against himself, which could not in any way affect the rights of the plaintiff, there was no eviction.

ID.—ID.—ID.—To constitute a partial eviction, in such a case as the one stated, it would be necessary for the plaintiff to show that the water company had established a right to divert the water by a title *prior* to that of the plaintiff, or that the defendant had at least had some agency in diverting it.

APPEAL from an order granting the defendant a new trial, in the Twentieth District Court, County of Santa Clara. BELDEN, J.

D. M. Delmas, for Appellant.

Assuming that the diversion of the water by the water company was, as against the plaintiff, a wrongful act, still the defendant by his agreement made himself a party to the tort, and is responsible for its consequences. (Waterman on Trespass, § 23, *et seq.*; *Wall* v. *Osborn*, 12 Wend. 40; *Rogers* v. *Ostrom*, 35 Barb. 523; *Dyett* v. *Pendleton*, 8 Cowen, 727; *Leadbeater* v. *Roth*, 25 Ill. 587; *Cohen* v. *Dupont*, 1 Sandf. 260; *Gilhooly* v. *Washington*, 4 N. Y. 217; *Halligan* v. *Wade*, 21 Ill. 470; *Wright* v. *Lattin*, 38 id. 293.) The consent judgment was merely the shape in which the parties embodied their private agreement, and it amounted to no more than the agreement put into authentic form. (*Union Bank* v. *Marin*, 3 La. An. 34.)

D. W. Herrington, for Respondent.

The eviction was by the San José Water Company. The plaintiff was not a party to the suit of the *Water Co.* v. *Beards-*

ley, and the lease of the plaintiff antedates the decree in that case. No *lis pendens* was filed. (Civ. Code, §§ 1213, 1214, 1215; Freeman on Judgments, §§ 154, 117; *Loomis* v. *Andrews*, 49 Cal. 239; *San Mateo Water-works* v. *Sharpstein*, 50 id. 284; Rawle on Cov. (4th ed.) pp. 133–5; Bigelow on Estoppel, pp. 12, 18.)

SHARPSTEIN, J.:

On the first day of November, 1874, the defendant leased the premises described in the complaint, with the appurtenances, to the plaintiff for the term of three years. At the time of the execution of the lease there was a stream of water running through the demised premises, and there was an action then pending which the San José Water Company had commenced for the condemnation of said water right. On the day following the execution of the lease, the defendant in that action, and in this, consented to the entry of a decree, in the action for condemnation, in favor of the water company, under which it appropriated the water of said stream to its own use. The plaintiff alleges that he was damaged thereby, and introduced evidence tending to prove that allegation. The issues were submitted to a jury, which returned a verdict in his favor. A new trial was moved for by the defendant upon a statement, and the Court granted the motion, on the ground "that the special circumstances under which the water was diverted from the leased premises did not constitute an eviction of the plaintiff by the defendant." The instructions given to the jury make it quite apparent that the Court, during the trial, thought otherwise. Among the instructions is the following: "When the eviction is partial, *as it was in this case*, and the lessee remains in the occupation of a portion of the demised premises, the measure of damages is the value of the premises as they would have been without the partial eviction, and then the value of them as evicted deducted." The Court in this instruction seems to have passed upon the principal issue in the case, and in so doing undoubtedly erred. But to our comprehension there is a graver difficulty to be overcome before a recovery could be upheld upon the facts of this case. The defendant does not appear to have participated in any act or proceeding for the diversion complained of, beyond

consenting to the decree of condemnation. As the plaintiff's lease antedates that decree, and he had no notice, actual or constructive, of the pendency of the action in which the decree was entered, he was not affected by it. The water company acquired no right to divert the water from the demised premises as against him. His property in the water was not condemned, and whoever proceeded under that decree to divest him of any right that he had acquired under the lease became liable to him for such damages as he might sustain by reason thereof. If the defendant had in any way participated in diverting the water he would doubtless be liable. But it does not appear that he did anything beyond consenting to the entry of a decree against *himself*, which could not in any way affect the rights or property of the plaintiff. It seems to us that the case is somewhat analogous to those cases in which a party recovers a judgment against one person, and then attempts to execute it against the property of another. We have never known it to be claimed in such a case that the party who suffered judgment to be entered against him would be liable for a trespass committed under it upon the property of some other person. For anything which appears to the contrary, the decree of condemnation might have been rightfully executed at the termination of the plaintiff's term. But there is nothing in the case from which we can infer that the defendant ever disturbed or licensed any one to disturb the plaintiff's enjoyment of the demised premises during the term for which they were leased to him. To constitute a partial eviction in this case it would be necessary for the plaintiff to show that the water company had established a right to divert the water by a title *prior* to that of the plaintiff, or that the defendant had at least had some agency in diverting it. And if the defendant did nothing beyond what he is charged with having done in this case, we are not aware of any principle upon which he can be held liable to the plaintiff in any form of action for the diversion of the water by a mere naked trespasser, who has assumed to take the plaintiff's property by virtue of a decree against the defendant. It therefore follows that the order granting a new trial must be affirmed.

Order affirmed.

MORRISON, C. J., concurred.

Myrick, J., concurred in the judgment, upon the ground first stated in the foregoing opinion.

[No. 7,272.—In Bank.]

McGREW v. MAYOR ETC. OF SAN JOSÉ.

Justices of the Peace—Elections—Constitutional Law—Judicial Officers—Definition.—Justices of the Peace are *judicial* officers within the meaning of the Constitution, art. xxii, § 10, and must be elected at the general election.

Appeal from a judgment for the defendant, in the Superior Court of Santa Clara County. Spencer, J.

The plaintiff was elected Justice of the Peace at the city election of San José, held under the act approved March 31st, 1876, entitled "An Act to amend an act to re-incorporate the City of San José"; and the case in the Court below was a proceeding for a writ of mandamus to the Mayor and Common Council, to compel them to canvass the returns, and declare the result of the city election as to Justice of the Peace. The Court below denied the application.

S. F. Leib, for Appellant.

The office to be filled is a city office, and is styled in the act, that of "City Justice."

D. W. Herrington, and *Louis Arques*, for Respondent.

By the Court:

In our opinion, a Justice of the Peace is one of the officers referred to and styled *judicial* in § 10 of art. xxii of the Constitution. (See also § 11, art. vi.)

By the provisions of that section, such officer must be "elected at the time and in the manner that State officers are elected." This is conclusive of the case. The election of the plaintiff in April last was therefore invalid, and the judgment of the Court below is affirmed.

[In Bank.—No. 7,183.]

THE PEOPLE *v.* HOGE ET AL.

CHARTER OF SAN FRANCISCO—CONSTITUTIONAL LAW.—Section 8, art. xi, of the Constitution—providing that "any city, containing a population of more than one hundred thousand inhabitants, may frame a charter for its own government, etc.—is self-acting, and does not need legislation to give it effect.

ID.—ID.—ELECTIONS—BOARD OF SUPERVISORS—BOARD OF ELECTION COMMISSIONERS—BOARD OF FREEHOLDERS.—Whatever powers were vested in the Board of Supervisors of San Francisco by the Consolidation Act, or the Political Code, were, under §§ 1, 33, and 34 of the Act of April 18th, 1878, transferred to the Board of Election Commissioners, in express terms; and the authority to cause a Board of Freeholders to be elected to frame a charter, (under the provisions of § 8, art. xi, of the Constitution) is therefore *not* vested in the former body.

ID.—ID.—The only condition imposed by the Constitution to make the election, provided for in § 8, art. xi, of the Constitution, valid, is, that the freeholders must be chosen at a general or special election; and, where there has been such an election, the voice of the people is not to be rejected for a defect, or even a want of notice, if they have in truth been called upon and have spoken.

ID.—ID.—ID.—ID.—ID.—THORNTON, J., dissenting, was of the opinion that the power of fixing the day for holding an election, under the provisions of § 8, art. xi, of the Constitution, was not vested in the Board of Election Commissioners, or in the people acting *en masse;* and that such power, being legislative in its nature, was vested in some authority competent, under the Constitution, to legislate on the subject; and that the election of the freeholders involved in this cause was held without authority, and was void.

APPEAL from a judgment for the defendants, in the Superior Court of San Francisco, Department No. 3. WILSON, J.

Rhodes & Barstow, for Appellants.

The Board of Election Commissioners had no power to order an election of a Board of Freeholders, or to call a special election. The Constitution does not confer any such power upon the board, nor is it conferred by the act organizing the board. (Stat. 1878, p. 299.) That act merely transferred to the board the powers and duties theretofore exercised and discharged by the Board of Supervisors. At that time the latter board had no power to call a *special election*. The power to cause a Board of Freeholders to be elected is vested in the city. Section 8 reads: "Any city * * * may frame a charter," etc. When power is granted to a municipality, which is not ex-

pressly conferred upon some particular department or officer, and is not of such a character that it must be exercised by some particular department or officer, such power vests in the legislative department of the municipal government. (1 Dillon on Mun. Corp. §§ 208, 197, 181; *Central Bridge* v. *Lowell*, 15 Gray, 106–116.)

Legislation is needed to give effect to § 8, art. xi, of the Constitution. No provision having been made in the Consolidation Act for the calling of special elections, none can be held without an act conferring that authority upon the city. In the absence of a call for such an election, duly made by the proper authority, the vote of the people would be as nugatory as would be the vote of all the electors cast the day before the day which may have been duly fixed by competent authority. (*Kenfield* v. *Irwin*, 52 Cal. 169, and cases cited.)

Robert Ash, also for Appellant.

The Constitution does not confer the power to call an election upon the Board of Election Commissioners, nor upon the Common Council, nor upon the Mayor, but upon the city itself; and the city can act through its legislative body, when power is thus conferred. (*Mayor of New York* v. *Furze*, 3 Hill, 612.) The Board of Election Commissioners have only the powers conferred upon them by the Act of March 18th, 1878—namely, for "the conduct, management, and control of elections." These powers relate only to what is necessary to be done, after the call for an election is made by competent authority. Nowhere in the Consolidation Act are the supervisors authorized to call an election.

A. L. Hart, Attorney-General, also for the Appellant.

S. M. Wilson, *Jas. T. Boyd*, *Ralph C. Harrison*, *R. M. Estee*, *T. B. Bishop*, and *T. I. Bergin*, for Respondents.

MORRISON, C. J.:

Section 8, art. xi, of the Constitution reads as follows:
"Any city containing a population of more than one hundred

thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State, by causing a board of fifteen freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of such city at any general or special election, whose duty it shall be, within ninety days after such election, to prepare and propose a charter for such city, which shall be signed in duplicate by the members of such board, or a majority of them, and returned, one copy thereof to the Mayor, or other chief executive officer of such city, and the other to the Recorder of Deeds of the county. Such proposed charter shall then be published in two daily papers of general circulation in such city for at least twenty days; and within not less than thirty days after such publication it shall be submitted to the qualified electors of such city at a general or special election; and if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the Legislature for its approval or rejection as a whole, without power of alternation or amendment, and if approved by a majority vote of the members elected to each house, it shall become the organic law thereof, and supersede any existing charter and all amendments thereof, and all special laws inconsistent with such charter."

The case as presented to the Court for its decision shows that the City and County of San Francisco is and was, during all the periods of time stated, a municipal corporation duly organized, and acting under a certain statute of the State of California, entitled "An Act to repeal the several charters of the City of Francisco, to establish the boundaries of the City and County of San Francisco, and to consolidate the government thereof," approved April 19th, 1856, and the several acts amendatory thereof and suppplementary thereto, and that said city and county contains a population of more than one hundred thousand inhabitants.

It further appears, that on the 4th of March, 1889, the Board of Election Commissioners of said city and county, organized under a statute of this State, entitled "An Act to regulate the registration of voters, and to secure the purity of elections in the City and County of San Francisco," approved March 13th, 1878, passed and adopted the following resolution:

"*Resolved*, By the Board of Election Commissioners for the City and County of San Francisco, State of California, that a special election in and for the City and County of San Francisco, be held on the 30th day of March, 1880, for the purpose of electing fifteen freeholders, who shall have been for at least five years qualified electors of the said city and county, to prepare and propose a charter for said city and county, as provided for in said Constitution, and that the qualified voters of said city and county be duly notified to meet in their respective precincts on Tuesday, the 30th day of March, 1880, at said special election, for the purpose of electing the said fifteen freeholders, who shall have been for at least five years qualified electors of said city and county, to prepare and propose a charter for said city and county."

It also appeared that on the 4th day of March, 1880, the Register of Election, by order of the Board of Election Commissioners, published a notice that a registration of voters for the election of fifteen freeholders would commence on Friday, March 5th, and would be continued from that time until March 15th. That on the 19th day of March, 1880, the Board of Election Commissioners issued a proclamation for a special election of fifteen freeholders, to be held on Tuesday, the 30th day of March, 1880, and in pursuance of such proclamation, public notice of such election was duly given.

It further appears from the transcript in the case, that a special election was ordered by the Governor of the State, to be held on the same day, March 30th, 1880, for the election of a Senator from the Eighth Senatorial District, comprising the City and County of San Francisco, and the County of San Mateo, to fill a vacancy in such senatorial district, "occurring from the inability of one Robert Desty, who was elected to said office at the general election held throughout this State on the 3d day of September, A. D. 1879."

It also appears that at such special election, held March 30th, 1880, the defendant Joseph P. Hoge, and fourteen others named in the amended complaint, received a majority of all the votes cast, and a larger vote than was polled for the person elected at that time a Senator to fill the vacancy above referred to.

This is a proceeding in the nature of a *quo warranto*, under

§ 803 of the Code of Civil Procedure, to oust the defendant from the office claimed by him under and by virtue of such special election held on the 30th of March, 1880.

On the part of the people the following grounds are taken:

1. The Board of Election Commissioners had no power to order an election of a Board of Freeholders.

2. The Board of Election Commissioners had no power to call a special election.

3. The authority to cause a Board of Freeholders to be elected, to pass a charter, is vested in the city—that is to say, in the Board of Supervisors.

4. Legislation is needed to give effect to § 8, art. xi, of the Constitution.

"An Act to regulate the registration of voters, and to secure the purity of the elections in the City and County of San Francisco," approved March 18th, 1878, (Laws of 1877–78, p. 299) is the statute under which the Board of Election Commissioners acted in the matter of electing fifteen freeholders to frame a charter for the City and County of San Francisco, and we will briefly refer to two or three sections of the act.

Section 1 provides that "the conduct, management and control of elections and matters pertaining to elections in the City and County of San Francisco, is hereby taken from the Board of Supervisors and vested in a board of five commissioners, who shall consist of the Mayor, Auditor, Tax Collector, the City and County Attorney, and the City and County Surveyor of said city and county, which board is hereby invested with all the powers and charged with all the duties as to elections and matters pertaining to elections now vested in said Board of Supervisors."

Section 33. "All provisions for carrying out the registration and election laws of said City and County of San Francisco shall be made by the Board of Election Commissioners, and demands on the treasury authorized or allowed by them for such purposes, shall have the same force and effect as if authorized or allowed by the Board of Supervisors."

Section 34: "All of the provisions of the Political Code touching the registration and qualification of voters and the method of calling, holding, and conducting elections, in force in

said city and county at the passage of this act, shall continue in force therein, so far as they are not inconsistent with the provisions hereof."

Section 1056 of the Political Code provides that "whenever a special election is ordered by the Board of Supervisors, they must issue an election proclamation, containing the statement provided for in subdivision 1 of § 1054, and must publish and post it in the same manner as proclamations issued by the Governor."

Whatever powers over elections were vested in the Board of Supervisors by the provisions of the Consolidation Act or the Political Code, were, under §§ 33 and 34 of the Act of April 18th, 1878, transferred to the Board of Election Commissioners in express terms, and it therefore follows that the third point made by appellants—that "the authority to cause a Board of Freeholders to be elected to frame a charter is vested in the city, or Board of Supervisors"—cannot be sustained.

But, in the view we take of the case, it is not necessary for us to determine what powers in respect to elections were vested in the Board of Supervisors of the City and County of San Francisco, under the provisions of the Consolidation Act and Political Code.

The provision of the Constitution (§ 8, art. xi,) is, in our opinion, sufficient for the purposes of this decision. It declares that "any city containing a population of more than one hundred thousand inhabitants, may frame a charter for its own government * * by causing a board of fifteen freeholders * * to be elected by the qualified voters of such city, at any general or special election."

The only condition imposed by the foregoing constitutional provision to make such election valid, is that the freeholders must be chosen at a general or special election, and in this case that condition was fulfilled.

It appears from the transcript that a proclamation was issued by the Governor for the election of a State Senator to fill a vacancy occurring in the Eighth Senatorial District, and that that election was ordered to be held on the same day on which the election of the fifteen freeholders took place. The election to fill such vacancy was a special election under § 1043 of the Po-

litical Code, which declares that "special elections are such as are held to supply vacancies in any office, and are held at such times as may be designated by the proper board or officer.

As has already been remarked, the Constitution authorizes any city containing a population of more than one hundred thousand inhabitants to frame a charter, by causing a board of fifteen freeholders to be elected by the qualified voters of such city, at *any general* or *special election.*

It is not pretended that the election in this instance was not fairly conducted, or that there was not a full expression of the public will at such election. Indeed, it appears that the vote for the Board of Freeholders was much larger than that cast for Senator, and it also appears that the respondent received at such election a very large majority of the popular vote. The honesty and fairness of the election are conceded, and it is simply claimed that there was no authority for holding it.

It is argued in the first place, that the power to call the election resided in the Board of Supervisors, and the point is also taken, that action on the part of the Legislature was essential to enforce and give effect to the provision of the Constitution. The first point has already been disposed of, and the second is not, in our opinion, well taken. Legislative action was not necessary to enable the inhabitants of the City and County of San Francisco to act, under § 8, art. xi, of the Constitution, in the matter of framing a charter. The Constitution nowhere provides either expressly or by implication for such legislative interference, and the construction placed upon the provision of the Constitution under discussion might result in entirely defeating its operation. If this ground can be sustained, it would result that hostile action, or even *non-action* on the part of the Legislature, would prevent the inhabitants of the city from exercising a power expressly given to them in clear and unmistakable language by the Constitution. It was manifestly the intention of §§ 8, 13, and 14, art. xi, as well as of § 25, art. iv, of the Constitution, to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature, and this is the more apparent in view of the fact that the charter framed by the Board of Freeholders, and ratified by the vote of the people, cannot be amended by the Legis-

lature. It (the charter) shall be submitted to the Legislature for its approval or rejection *as a whole*, without power of alteration or amendment, and when so approved it cannot be amended except upon proposals submitted by legislative authority to the voters of the city and county.

In this connection, the language of the Supreme Court of Iowa appears applicable: "Upon considerations like this, the courts have held that the voice of the people is not to be rejected for a defect, or even a want of notice, if they have in truth been called upon and have spoken. In the present case, whether there was notice or not, there was an election, and the people of the county voted, and it is not alleged that any portion of them failed in knowledge of the pendency of the question, or to exercise their franchise." (*Dishon* v. *Smith*, *County Judge*, 10 Iowa, 218.)

We have arrived at the conclusion that the election of March 30th, 1880, should be declared valid, the more willingly for the reason that no possible injury can result from such a determination. The people of the City and County of San Francisco have, after a fair and full election, regularly and honestly conducted, expressed their wish that a charter should be prepared for their ratification, and the charter so prepared by the respondent and his associates must, before it can become a law, receive such ratification, and after that, the approval of the Legislature.

In our opinion the judgment of the Court below should be affirmed, and it is so ordered.

SHARPSTEIN, J., MYRICK, J., MCKINSTRY, J., ROSS, J., and MCKEE, J., concurred.

THORNTON, J., dissenting:

I dissent. By virtue of the provisions of section 8 of article xi of the Constitution of this State, a privilege is given to the City and County of San Francisco to frame a charter for its own government "consistent with and subject to the Constitution and laws of this State," by causing a board of fifteen freeholders, with the qualifications prescribed in the section, to

be elected by the qualified voters thereof at any general or special election, whose duty it shall be within ninety days, etc., to prepare and propose a charter for such city, etc. The defendants claim to have been duly elected to prepare and propose the charter referred to, and this action is brought to test the validity of their election and their title to the office which they claim.

The case, then, turns on the validity of the election. Is it valid?

This election was held by virtue of an order of the Board of Election Commissioners of the City and County of San Francisco, constituted and organized under an act of the Legislature entitled, "An Act to regulate the registration of voters, to secure the purity of elections in the City and County of San Francisco," approved March 18th, 1878. This order was made by a resolution of the board above mentioned, adopted on the 4th of March, 1880, which directed an election to be held on the 30th of the same month. By order of this board, the Registrar of Elections published a notice for registration, to continue from the 5th of March to the 15th of March, 1880, and on the 19th of March, 1880, the board issued a proclamation of such election to be held on the day above mentioned, and notice was accordingly given.

The Board of Election Commissioners by its action fixed the day of election. If they had such power the election is valid, if they did not have it the election is void. It is settled by repeated decisions of the Supreme Court of this State, that no election is valid where the time of holding it has not been fixed in advance by law. The latest case on the subject is *Kenfield* v. *Irwin*, 52 Cal. 169. The rule is thus clearly stated by the Court in this case. "The time of holding an election, whether general or special, must be authoritatively designated in advance, either by law or by some means which the law has prescribed, otherwise the election is held without authority, and is ineffectual for any purpose." The opinion further states that this rule is supported by a uniform line of decisions of this Court—and cites the following cases: *People* v. *Porter*, 6 Cal. 26; *McKune* v. *Weller*, 11 id. 49; *People* v. *Martin*, 12 id. 409; *Westbrook* v. *Rosborough*, 14 id. 180. (See also *People* v. *Mathewson*, 47 Cal. 442, and *Sawyer* v. *Haydon*, 1 Nev. 78.)

Did then the Board of Election Commissioners have the power to fix the time at which such election was to be held? Their powers are derived entirely from the act of 1878, above cited. If we find no such power in the act, it does not exist. The portions of this act germane to the question are cited in the opinion of the Court. By its first section, such powers are given to the Board of Election Commissioners as were *then* vested in the Board of Supervisors of the city and county. An examination of the Consolidation Act and its amendments, and the Political Code, fails to disclose any such power in the Board of Supervisors on the 18th of March, 1878. No statute granting such power was brought to the notice of the Court on the argument. The §§ 33 and 34 of the Act of 1878, quoted in the opinion of the Court, confer no such power. Section 33 authorizes the Board of Election Commissioners to make all provision for carrying out the registration and election laws in the City and County of San Francisco. This refers to the laws then existing. It must be read together with the first section to arrive at the proper interpretation, and we find in the first section a restriction of the powers of the Board to such as were then vested in the Board of Supervisors. The same may be correctly stated as the meaning of the 34th section of the act. As we have seen, no law existed on the 18th of March, 1878, vesting any power to fix the day on which an election of any kind should be held in the Board of Supervisors, and it follows that no such power was vested in the Board of Election Commissioners.

In accordance with the rules laid down in the cases above cited, the election should be held void. What there is to take this case out of this rule we cannot conjecture, unless it can be maintained that the electors of the city of San Francisco as to the matter in question compose an autocracy independent of law and all legislative authority.

In the opinion of the Court, § 1056 of the Political Code is referred to. Admitting that this section was even in force in the City and County of San Francisco, by its terms it confers no power to appoint the day for an election, but merely prescribes what shall be done, where such power exists and is exercised. But it is a matter of grave doubt whether it ever was

in force in the city and county referred to, under the provisions of § 19 of the Political Code. (See subd. 1 of § 19.)

Is the power of the Board of Election Commissioners enlarged by § 8 of art. xi? We cannot perceive that it is. The grant of power there is to the city in its corporate capacity, and not to the Board of Election Commissioners. The grant is not in terms to any agency, whether consisting of a board, a person, or a number of persons. It is a grant to the city, to be exercised by it in a lawful mode. If an election is to be held, or anything else done under the grant, it must be in accordance with law.

We lay the more stress on the fact that this grant is made, by the express words of the Constitution, to the city, on account of the mode of legislation heretofore adopted in regard to the city. While the city is made a corporation by the Consolidation Act, it will be observed that in the Act of 1856, (Consolidation Act) and the acts supplementary and amendatory of it, the powers which would be styled corporate are vested in the Board of Supervisors.

The powers vested by the Act of 1878 in the Board of Election Commissioners are in their nature ministerial and executive. They merely pertain to the execution of the laws in existence. None of them are legislative. The power to appoint a time for holding elections is essentially legislative. It is an element in the policy of the State or community, and this policy is a matter on which the judgment of the law-making power should be and is to be exercised. Such matters are regulated by the Constitution or by some legislative authority. We say some legislative authority, because it may be by the local legislature of a municipal corporation. This delegation of power may be made by a general law. It is so treated in the Constitution. (See the following provisions: §§ 3, 4, 25, subds. 9, 11, of art. iv; § 20 of art. xx; § 10 of art. xxii.) Subdivisions 9 and 11 of art. iv place the subject of elections entirely under the control of the Legislature, with a single exception.

Now the city is a corporation of that character, whose powers are exercised through the medium of authorized officers or agents. It is not like a New England town, whose inhabitants come together in mass meeting, but in a mode fixed by law, to perform corporate acts.

The inhabitants of the city are not authorized by any law to perform a corporate act in a meeting of its inhabitants *en masse*, by whatever mode called together. As was said by Shaw, C. J., in *Warren* v. *Charlestown*, 2 Gray, 101: "The marked and characteristic distinction between a *town* organization and that of a *city* is, that in the former all of the qualified inhabitants meet, deliberate, act, and vote in their natural and personal capacities; whereas, under a city government, this is all done by their representatives." This is as true of an incorporated city in California as in Massachusetts.

Such a corporation can only act by its agents. Marshall, C. J., in *Clark* v. *Corporation of Washington*, 12 Wheat. 53, speaking of a power granted to the City of Washington, to authorize the drawing of lotteries for certain purposes, thus speaks of the manner in which the power is to be exercised: "A corporation aggregate can legislate within its prescribed limits, but can carry its laws into execution only by its agents." Again, in the same case, referring to the power granted, he said: "It is to be exercised like other corporate powers, by the agents of the corporation under its control."

This seems to be the general rule. In the various cases in which reference is made to the subject, the courts treat it as settled beyond contradiction. It is treated as an axiom, needing no authority to sustain it. In none of them is any authority cited. (See the following cases: *Dey* v. *Jersey City*, 19 N. J. Eq. 412; *Baltimore* v. *Poultney*, 25 Md. 18.) The rule is thus stated by Dillon in his work on Municipal Corporations: "Where there is a council or governing body, the inhabitants or voters in their natural capacity have no power to act for or bind the corporation, but the corporation must act, and can be bound only through the meeting of this body." (See 1 Dill. Mun. Cor. § 197; § 19, and cases there cited; see also § 208.)

The grant then being to the city, it must be exercised by some authorized agent. By no express enactment, as we have seen, is power vested in the Board of Election Commissioners, nor do we see any grant to this body by implication. There is much more plausibility in the contention, that the power vests in the governing body of the corporation—the Board of Supervisors—and this last would seem to be the proper agency through

which the power granted is to be exercised, in accordance with the rule as laid down by Mr. Dillon. In the case of the *Central Bridge Corporation* v. *The City of Lowell*, 15 Gray, 116, certain arrangements were, by an act of the Legislature, authorized between the two corporations, to be valid and binding when the act was accepted by them, "at a legal meeting of the respective corporations." The act came before the Supreme Court in Massachusetts to be interpreted, and the Court, by Shaw, C. J., said: "That the acceptance by the Mayor, and Aldermen, and Common Council of the city of Lowell, in due form, was a legal acceptance by the corporations, because it was done by their legally constituted representatives. All the powers of the city as a municipal corporation were vested in the City Council, except those, if any, specially and expressly reserved by the charter to be exercised by the people."

In the case of the City and County of San Francisco, the powers of legislation which pertain to it as a corporation are for the most part vested in the Board of Supervisors. And it would seem that the power to fix the day for any election, which is in its nature legislative, belongs to the Board of Supervisors.

In executing this grant to the city, it cannot be denied that all the powers necessary to its proper execution vest in the corporation. A large discretion is conferred on the corporate authority as to the mode in which this power is to be executed. (*McCullough* v. *State of Maryland*, 4 Wheat. 409.) It may be justly held that the proper interpretation of this grant of power by the Constitution is to empower the corporate authorities, whoever they may be, to exercise this discretion. It certainly pertained to some legislative authority to determine in advance whether the election should be held on the day of a general or special election; whether the freeholders should be elected by general ticket, or by districts; if by districts, how many districts there should be. A further matter to be considered and which would seem to be comprehended in a proper execution of the power, is this: whether or not the delegates elected should reside within the limits of the district from which such delegate or delegates are elected, or whether a delegate residing in any portion of the city may be chosen. On all these matters

the legislative judgment should be exercised, and the city, by its proper authorities, allowed the privilege of considering and adopting them or not, as may seem to them best. Certainly, all these matters are embraced in the grant.

The course resorted to in ordering the election, proceeds on the assumption that § 8 of art. xi is self-executing. The above considerations show that it is not.

In *Austin* v. *G. C. & S. F. R. R. Co.* 45 Tex. 234, a section of the Constitution of that State came before the Supreme Court to be construed. The section is in these words: "The inferior courts of the several counties of this State shall have the power, upon a vote of two-thirds of the qualified voters of the respective counties, to assess and provide for the collection of a tax upon the taxable property, to aid in the construction of internal improvements, provided that such tax shall never exceed two per cent. upon the value of such property."

The Legislature, to execute this provision of the Constitution, had enacted a statute. It was contended that this statute was unconstitutional, on the ground that the section quoted above determined the power and authority, and also the character of the aid to which it relates, and the manner and form in which it is to be extended. The Court say this as to the manner and form in which the power is to be executed: "Now, while it is beyond question that the counties in this State, when authorized by a vote of two-thirds of the qualified voters, may aid in the construction of internal improvements, certainly the manner of doing so is not attempted to be defined or settled. Shall it be done by a direct donation of money or property; by the loan of the credit of the county; by the indorsement of the bonds or contracts of the company or parties engaged in such work, or by the county becoming a stockholder or participant in the enterprise? Aid might be given in either of these ways, or in various others which might be suggested. The manner in which it shall be given, and the conditions and stipulations upon which it is done, are unquestionably left to be determined by the municipal authorities at their own discretion, or under the guidance and direction of general or special legislation. If the former is the correct conclusion, as is insisted by one of the counsel for appellees, there is no force in this objection. In our

opinion, however, the sounder conclusion is, that where there is a grant of power in the Constitution to a department of government, or to a constitutional or statutory officer, or tribunal, without defining the manner and form on or by which it is to be exercised and carried into effect, the Legislature may legitimately prescribe reasonable rules by which this may be done." (45 Tex. 264–5.)

The above remarks are applicable to the manner and form in which the power here given to the city is to be exercised.

The Court further said: "And though such power may not be taken away by the Legislature, and should it fail or refuse to legislate so as to provide for the efficient use and exercise of the power, the department, officer, or tribunal to whom it is delegated might possibly act in accordance with its own discretion, yet when the Legislature has made reasonable and appropriate provision for its proper exercise, it should and will be exercised in conformity with such provisions."

It may be admitted that when the legislative authority fails to be exercised, (reference is here made to the State Legislature) the corporation may proceed to act in accordance with its own discretion, still that discretion should be exercised in the usual legislative mode, by ordinance or resolution passed in accordance with the provisions of the existing law. The corporate authority alone should act. And as such proceeding would be a corporate act, it should be performed by the governing body of the corporation; and not by any irregular or unauthorized movement of the electors residing within the corporate limits.

If such an act could be done by the inhabitants of the city who are qualified to vote, surely it should be done in some mode bearing the semblance of a legal method. If by a meeting, like the town meetings of the New England system, it should be called and held in accordance with some rules prescribed in advance. As to the New England towns, and the manner in which their meetings are held, see 1 Dillon on Mun. Corp. § 11, and notes; §§ 204–7, and notes. The times at which such meetings are held are fixed by law, and their method of procedure—and the legal provisions are strictly enforced in passing on the validity of their proceedings. The cases cited in the notes referred to indicate this.

It is not necessary, however, to decide whether the power to fix the day for holding this election pertained to the Legislature of the State or the Board of Supervisors. It is sufficient to hold, that the power was not vested in the Board of Election Commissioners.

It is a matter of no importance that a large vote was cast at the election of the 30th of March. This adds nothing to the validity of the election. Nor is it a matter to be considered that the election was fairly held. If the election was illegal, it was so far unfair as to demand judicial condemnation. In such a case it should no more be approved than if it had been fraudulently conducted.

The foregoing considerations lead to the conclusion that the election of the defendants was invalid, and, therefore, in my opinion, the judgment of the Court below should be reversed.

[No. 6,748.—Department No. 1.]

HINKLE ET AL. v. THE SAN FRANCISCO & NORTH PACIFIC RAILROAD COMPANY.

CONTRACT—VARIANCE.—The complaint alleged that the plaintiffs entered into a contract with the S. & M. R. R. Co. (afterward merged into and consolidated with the defendant) for the construction of a tunnel—the contract price to be paid upon estimates of the chief engineer; and that the engineer, by collusion with the company, and for the purpose of defrauding the plaintiffs, omitted certain work from his estimates. Upon the trial the plaintiffs offered to prove that he did extra work, on the promise of the engineer, (subsequently ratified by the president of the company) that they should be paid for it, as for similar work under the contract. *Held*, that as the plaintiffs had not sued for extra work, but for work done under the original contract, the evidence was not admissible.

ID.—INSTRUCTIONS.—The Court in effect instructed the jury that, if the estimates of the chief engineer were honestly made, they were conclusive, but the bill of exceptions did not contain the contract, or any of the evidence to which the instruction related. *Held*, that it could not be said that there was any error in the ruling.

IMPEACHMENT OF WITNESS—CHARACTER—EVIDENCE.—A witness, with a view to impeach him, was asked certain questions, (stated below) affecting his moral character. *Held*, that they were rightly ruled out.

APPEAL from an order granting a new trial, in the Twenty-second District Court, County of Sonoma. TEMPLE, J.

The rulings referred to in the opinion were as follows: The plaintiff moved the Court to instruct the jury that if they found that there was work done in excess of the estimates of the chief engineer, they should find for the plaintiff for the value of such excess at the contract price, and the Court modified the instruction by adding the following words: "provided that you find that the estimates of Zooks (the chief engineer) were false and fraudulent, but if they were honestly made they are conclusive, and you must find for the defendant."

The plaintiff also moved the Court to instruct the jury, that, even though they should believe from the evidence that a settlement was made between the parties and receipts passed, yet if they should also find that the estimates upon which the amount was ascertained were not correct, and that plaintiffs were misled or deceived by them, and settled under the mistaken belief that the estimates were correct, then that the plaintiffs were not bound by the settlement. But the Court refused to give the instruction.

On the trial—with a view to his impeachment—a witness of the defendant was asked the following questions:

"Q.—Were you the engineer of the railroad company, (referring to a railroad company not involved in the suit) receiving a salary from the company, and dividing the profits with the contractors at the same time?"

"Q.—Did you get $3,500 as a bribe from the contractors in that case?"

The first of which was objected to as not the proper mode of impeaching a witness, and the last as irrelevant and impertinent. Both questions were excluded.

McAllister & Bergin, for Appellant.

The evidence of work was rightly excluded as being immaterial under the pleadings. The attempt to impeach Lewis was wholly irregular. (*People* v. *McKellar*, 53 Cal. 65.) The objection to the instruction is untenable, in the view of the averments of the complaint, and in the absence of the contract. (*Barnes* v. *Quigley*, 59 N. Y. 268; *Stout* v. *Coffin*, 28 Cal. 67; *Mercier* v. *Lewis*, 39 id. 535.) Where the bill of exceptions

does not contain the evidence, the Court cannot revise the instructions. (*People* v. *McCauley*, 1 Cal. 385; *People* v. *Baker*, id. 405; *People* v. *Best*, 39 id. 691; *People* v. *Whitney*, 53 id. 421.)

Flournoy & Mhoon, for Respondents.

Gross error or mistake, even though not willful or fraudulent on the part of the engineer, and even though unknown to the appellants, might well be corrected under the allegations of actual fraud. (Civ. Code, § 1573; Code Civ. Proc. §§ 463, 1867.) The allegation of actual fraud might be stricken out, and yet the complaint be good, and the action lie.

Ross, J.:

The plaintiffs moved for a new trial in the Court below, on a bill of exceptions, solely upon the ground of alleged errors in law occurring at the trial and excepted to by them. The Judge who tried the cause and passed upon the motion, thought that the first exception was "probably well taken," and therefore entered an order granting a new trial. From that order defendant brings this appeal.

No question of fact being involved, it will be our duty to reverse the order if, in our opinion, no error of law was committed in the trial already had; and this is to be determined from the record as made.

In the complaint it is alleged that on the 9th of October, 1875, the plaintiffs entered into a contract with the Sonoma and Marin Railroad Company whereby they undertook and agreed to excavate and construct a certain tunnel, within a designated time, according to certain plans and specifications, and to the satisfaction of the chief engineer of the railway company, for which the company promised to pay plaintiffs at certain rates, in gold coin, and in the following manner, to wit: "The chief engineer of said Sonoma and Marin Railroad Company was, by the terms of said agreement bound and obliged to measure and estimate, on or about the first day of each calendar month, the amount of work done during the preceding month, and to estimate and certify to the amount due for such work according to

said contract, and to deliver such certificate to the president of said company; and thereafter, on the tenth day of each month, the said company was bound and obliged to pay to these plaintiffs the amount named in said certificate, less twenty per cent. thereof, which said twenty per cent. so deducted and retained, should be paid to plaintiffs on the said engineer's final estimate and certificate upon the completion of said contract."

The complaint also alleges full performance on the part of the plaintiffs of all the requirements, covenants, and conditions of the contract, and the due acceptance of the work, and, further, that on the 29th of June, 1877, the said Sonoma and Marin Railroad Company merged into and was consolidated with the defendant, pursuant to law, whereby defendant "succeeded to all the rights, duties, and obligations of the said Sonoma and Marin Railroad Company."

As constituting the plaintiffs' cause of action, the complaint next charges: "That for the excavations and embankments and tunneling done and made under said contract as aforesaid, the said chief engineer made his estimates of the work done and returned his certificates of the sums due thereon, less 20 per cent. thereof, from time to time, until March 9th, 1877, when said engineer made his final estimate of the work done, and returned his final certificate of the sum due plaintiffs for the performance of said contract. That said engineer, in making said estimates and returning said certificates, falsely, fraudulently, and by and with the procurement of and collusion with said Sonoma and Marin Railroad Company and its officers, neglected and omitted and refused to include in estimates of work done by plaintiffs under said contract, 11,922 cubic yards of excavation and embankment, and also fifteen feet of tunneling, unfairly, improperly, and contrary to the intent and meaning of said contract; that said plaintiffs have duly notified said engineer and the defendant of the foregoing facts, and demanded from said engineer an estimate of said 11,922 cubic yards of embankment and excavation and fifteen feet of tunnel, and a certificate of the amount due therefor, but said engineer refused and still refuses to estimate said work, or certify the amount due therefor, in collusion with and by the procurement of said defendant, and with the intent and for the purpose of

defrauding these plaintiffs, to their damage in the sum of $12,963.90"; for which sum the plaintiffs ask judgment against the defendant.

It will be thus seen that the gist of the plaintiffs' action, as stated in the complaint, is the alleged fraudulent omission and refusal of the engineer to include in his estimates certain work performed by plaintiffs.

At the trial it was conceded that the plaintiffs performed all of the work provided for in the contract, and that it was duly accepted by the defendant. Counsel for plaintiffs then offered to prove by one of the plaintiffs that "during the progress of the work under the contract, he was ordered by the engineer to remove, and did remove certain earth that had caved in upon the work, and that the engineer of the road told him that he would be paid for it as he was paid for similar work under the contract; that afterward the matter was brought to the atttention of Mr. Donahue, the president of the road, and that Mr. Donahue agreed to it." The offer having been objected to by the defendant, the Court sustained the objection, and the plaintiffs reserved an exception. This ruling seems to have been the ground of the order granting a new trial.

In our opinion, the ruling was right, and the exception not well taken. Admitting that evidence tending to show that the estimates of the engineer were grossly erroneous, was material upon the question of fraud, there was nothing in the offer tending to show that the estimates were in any respect erroneous. On the contrary, it seems to have proceeded upon the theory that the work referred to was independent of the contract, and was performed by the plaintiffs on the statement of the engineer that it would be paid for "as similar work under the contract" was paid for; in other words, upon the theory that it was *extra work*. Indeed, in that portion of the testimony of the plaintiffs found in the bill of exceptions, each of them speaks of the work as "extra work." If it be treated as such, it is enough to say that the plaintiffs have not sued for the value of any extra work. It is, therefore, not necessary to inquire whether the president of the defendant corporation could bind it by his promise to pay.

Not only is there nothing in the "offer" already noticed

tending to show that the estimates of the engineer were erroneous, or fraudulent, or false in any respect, but there is nothing in any of the evidence embodied in the bill of exceptions tending to show any one of these things. On the contrary, the bill recites that at the trial the defendant gave evidence purporting to explain the nature and extent of the work in question, "purporting to show that said work had been fully estimated by the engineer and paid for by the defendant, and the engineer so testified."

The bill of exceptions does not contain the contract under which the work was done, nor does it present any evidence upon the points to which the instructions complained of relate. Under such circumstances it cannot be said that there was any error in the rulings of the Court below respecting the instructions before us. (*People* v. *Whitney*, 53 Cal. 421; *People* v. *Best*, 39 Cal. 691.) Nor was there any error in the ruling in respect to the attempted impeachment of the witness Lewis. (1 Greenl. Ev. § 449.)

The motion of the plaintiffs being based entirely on alleged errors in law occurring at the trial, and it being incumbent on them to show error, and the record failing to disclose any, we feel constrained to reverse the order granting a new trial.

Order reversed.

McKINSTRY, J., and McKEE, J., concurred.

[No. 6,341.—In Bank.]

ALTSCHUL *v.* DOYLE SR. ET AL.
ALTSCHUL *v.* POLACK ET AL.

ESTOPPEL — FORMER JUDGMENT — LANDLORD AND TENANT. — If a landlord defends for and in the name of his tenant, and puts his title in issue in aid of the tenant's right of possession, a judgment against the tenant is a bar to a subsequent action by the landlord against the party recovering the judgment. But it must appear that the subject-matter or question was not only the same, but that it was submitted on the merits, and actually passed upon by the Court.

ID.—ID.—ID.— Accordingly, in an action of ejectment, where there was a plea of a former judgment in favor of defendant against plaintiff's tenant, and it appeared that the plaintiff was originally a party defendant, and conducted the defense, but that on the close of the testimony, on motion of the former plaintiff, the suit was dismissed as to him, and his deraignment of title stricken out, and that the Court refused to permit the defendants to show that they were his tenants, and to justify under his title: *Held*, that there was no estoppel, and that it made no difference that the rulings of the Court were erroneous, and that an appeal might have been taken.

ID.—ID.—ID.— STATUTE OF LIMITATIONS — ADVERSE POSSESSION. — In an action to establish an involuntary trust as to real estate against Mary P., and to compel a conveyance of the legal title, it appeared that the cause of action accrued more than eight years before the commencement of the action, but that the plaintiff was at that time in the possession of the land by his tenant, and remained so until about December, 1867, at which time the defendant entered upon the land by collusion with the tenant, and thenceforth claimed to hold adversely. *Held*, upon a plea of the Statute of Limitations, that the plaintiff was not barred.

APPEALS, in two cases, from judgments in favor of plaintiff, and orders denying new trials, in the Twelfth District Court, City and County of San Francisco. DAINGERFIELD, J.

In the lower Court, the two cases (numbered respectively 14,113, and 18,502) were, by consent, tried together, it being stipulated that the testimony and proceedings should apply to both cases as far as applicable.

Case No. 14,113 was an action of ejectment (commenced April 17th, 1868) against Mary Polack, Joel Polack her husband, James Doyle Sr., and two of her tenants, and other defendants who disclaimed.

Case No. 18,502 was an action (commenced Dec. 9th, 1874) by the same plaintiff against Mary Polack and her husband, to establish an involuntary trust against her as to a portion of

the land in question in the ejectment suit, and to compel her to convey the legal title.

CASE NO. 14,113.—In this suit the Court finds that at, and for a long time prior to, the commencement of the suit, the plaintiff was seized of the land in question, and that the defendants entered and ousted him, and ever since have continued to withhold the said land from the plaintiff. On the trial, the plaintiff proved a prior possession and ouster by the defendants. The defendants' case rested upon the alleged estoppel of a former judgment. With regard to this the facts are stated in the opinion.

CASE NO. 18,502.—In this suit the Court finds to the following effect:

In 1861, Joel Polack purchased the land described in the complaint, and caused the legal title to be conveyed to one Breed, in secret trust for his own benefit, and with intent to hinder, delay, and defraud creditors. In April, 1863, at the request of Polack, Breed conveyed the land, upon the same trusts, to Bryan. In June, 1863, one Ford became the owner of Joel Polack's interest by a sheriff's deed, made in pursuance of a sale under an execution against the said Joel; and in 1865, conveyed to the plaintiff. In 1866, Bryan conveyed to the defendant Mary Polack, who took with notice of the facts. On November 27th, 1867, Joel and Mary Polack conveyed a portion of the land in question to James Doyle Sr., upon the sole consideration that he, and his wife, and James Doyle Jr. (his son)—then the tenant of said plaintiff in possession of said lands—would collusively and fraudulently let the Polacks into possession of said land in fraud of the plaintiff, and he took the conveyance with intent to defraud the plaintiff.

James Doyle Jr. entered into possession of the land in question in 1862, as tenant of the grantors of the plaintiff, and has remained in possession, as tenant of said grantors and the plaintiff, ever since, and has never surrendered or delivered up the possession; and the defendants, by fraud and collusion with the said tenant, and with knowledge of the rights of the plaintiff, have been by him let into possession of the premises with him.

The plaintiff and his predecessors have been in possession of

the land in question since October 7th, 1862, and the defendants have not been in adverse possession for five years before the commencement of the suit.

With regard to the circumstances under which the defendants entered, and the nature of their subsequent possession, it appeared from the evidence that on November 23rd, 1867, a notice to quit was served upon the Doyles by the plaintiff, and that, shortly afterward, Mary Polack made an arrangement with James Doyle Sr., that he should have a fifty-vara lot in the land, and should convey the balance to Mrs. Polack, which was done accordingly; that in consequence of this arrangement, the Doyles delivered possession to the Polacks, and quit the premises, but shortly afterward returned, and continued to occupy a portion of the land under the new arrangement. It is stated in the statement that "the defendant Mary Polack, and James Doyle Sr., offered testimony showing that from November, 1867, they had been in possession of the premises, holding against the plaintiff and his associates." It also appeared that plaintiff's agent, Lynch, had notice of these facts, and he testified that after this the possession of the Doyles was regarded "by us" as hostile.

Walter Van Dyke, for Appellants.

The first action (No. 14,113) is barred by *res judicata*. The evidence is conclusive that Altschul defended the action in the Fourth District Court for James Doyle Jr. and his mother, as their landlord. He and his associate, Lynch, had the entire management of the case, and the Doyles did not take any part in the defense. The action was properly dismissed as to Altschul, under the practice then—he being out of actual possession; and it was in the discretion of the Court to refuse to open the case, after he had closed, to allow him to prove the relationship of landlord and tenant. Whether the Court properly exercised its discretion, or whether the decision was erroneous, makes no difference. Altschul had his day in court, and took no appeal. (*Valentine* v. *Mahoney*, 37 Cal. 389; *Gray* v. *Dougherty*, 25 id. 266; *Morenhout* v. *Higuera*, 32 id. 293; *Reynolds* v. *Harris*, 14 id. 678; *Barnum* v. *Reynolds*, 38 id. 646; *Calder-*

wood v. *Brooks*, 28 id. 151; *Caperton* v. *Schmidt*, 26 id. 479; *Davis* v. *Perley*, 30 id. 634.)

The second action (No. 18,502) is barred by the Statute of Limitations. The plaintiff admits, in his other action, being ousted November 23rd, 1867, and the testimony on the trial of this shows that since that time defendants, Messrs. Polack and Doyle Sr., have held adverse possession, under the legal title, which the plaintiff now seeks to have transferred to him. The equity under which he claims, if any, accrued to Ford, the grantor of the plaintiff, December 15th, 1863; and he was then out of possession, and never obtained possession. He conveyed his interest to the plaintiff October 10th, 1865. This suit to subject the legal title to his alleged equity is brought nine years after, and over seven years after an admitted and proved ouster and adverse holding.

M. Lynch, for Respondent.

There is no merit in the claim of estoppel against plaintiff. It is not sufficient to show that judgment has been procured against the tenant for the possession of the premises, but it must be shown that the landlord was notified of the pendency of the action, and had an opportunity to defend; otherwise the landlord is neither bound nor estopped by the judgment. (*Douglass* v. *Fulda*, 45 Cal. 592; *Wheelock* v. *Warschauer*, 34 id. 265; *Steinback* v. *Krone*, 36 id. 307: *Valentine* v. *Mahoney*, 37 id. 389; *Russell* v. *Mallon*, 38 id. 262; *Thompson* v. *Pioche*, 44 id. 508; Bigelow on Estoppel, 2nd ed. 354–5.)

In the former case, at the instance of the plaintiff and against the earnest objection of Altschul, the case was dismissed as to him; and the whole evidence of title in him, which had already been put in evidence, was stricken out. (*Barrows* v. *Kindred*, 4 Wall. 399; *McVeigh* v. *U. S.* 11 id. 267; *Windsor* v. *McVeigh*, 93 U. S. 274; *Chant* v. *Reynolds*, 49 Cal. 216; *Porter* v. *Garrisino*, 51 id. 561.)

The position of appellants that plaintiff is barred by the Statute of Limitations is equally untenable. The Doyles were tenants of plaintiff when served with a notice to quit, November 23rd, 1867; and immediately after this notice they declined to

deliver possession to him, but instead entered into a conspiracy with Polack and wife, through which they were let into possession of the premises with the Doyles. That possession, for the purpose of this suit (No. 18,502) is deemed to be the possession of the landlord. The Doyles are tenants of the plaintiff, and having entered into possession, cannot deny his title. The same estoppel exists as to the Polacks, who entered under them; and being in possession of the premises as tenants of the plaintiff, and holding the legal title as trustees for him, the Statute of Limitations has no application. (*Love* v. *Watkins*, 40 Cal. 547; *Gerdes* v. *Moody*, 41 id. 350; *Talbert* v. *Singleton*, 42 id. 391; *McCauley* v. *Harvey*, 49 id. 497.

McAllister & Bergin, also for Respondent.

It is clear that the mere relation of landlord and tenant does not render the landlord an improper party in an action of ejectment. The complaint in the Polack case charged that all the defendants were in possession. There is nothing to show but that the landlord was in possession at the commencement of the action, as well as the tenant, or to show that he was not a proper party to the action. The question therefore is thus presented: Whether, if a party be properly sued in a court of competent jurisdiction with respect to his property, and in that action, upon motion of his adversary, he is prevented from having his day in court, can that adversary afterward use the judgment against him? Upon no principle of law can he be permitted to do so. (Authorities cited, *supra*.) The case of *Windsor* v. *McVeigh*, 93 U. S. 274, is in point. It is claimed that the tenant of Altschul was retained in the case, and that if he felt aggrieved by the result against his tenants, he was bound to appeal, and, failing to do so, is concluded. There is no authority or principle for such a position. The principle of law that no man shall take advantage of his own wrong forbids it. In none of the cases relied upon by the appellant was the question presented as to whether the landlord would be bound by the judgment, although prevented from litigating his title, and excluded from all participation in the litigation.

MYRICK, J.:

The appeals in these cases were heard before Department two of this Court, and an opinion was filed March 17th, 1880, affirming the judgment and order of the Court below, and a hearing in bank has been granted. The substantial question at issue in the Court below was, and in this Court is, whether the plaintiff, Altschul, is barred of his recovery in the actions by the proceedings and judgment in a former action in ejectment commenced by Mary Polack against Lynch, Altschul, Mary Doyle, Rix, and others. In the last named action the defendants answered, alleging title in themselves and those under whom they claimed. During the trial the plaintiff dismissed the action as to Rix. At the close of the evidence the plaintiff dismissed the action as to Altschul, and moved to strike out all the documentary evidence showing deraignment of title by Altschul from one Dorland. The defendants objected, on the ground that James Doyle and Mary Doyle were defending under the title of and by Altschul, they being his tenants and he defending for them, and that they were entitled to the benefit of his title. The Court overruled the objection, and struck out the evidence. The defendants, James and Mary Doyle, then moved the Court to open the case, and to allow them to show that they were the tenants of Altschul, and to prove his title. The Court denied the motion, and judgment was rendered dismissing the case as to Rix, Altschul, and James Doyle Sr., and in their favor for costs. Lynch moved for a new trial, which was granted, and the action was subsequently dismissed as to him. These dismissals left the case standing in favor of Mary Polack, plaintiff, *versus* Mary Doyle and James Doyle Jr., defendants, and judgment went for plaintiff and against defendants.

In the cases at bar, the recovery in the former suit was pleaded in bar of these actions; and after hearing the evidence, the Court found that at the instance and motion of the plaintiff in the former action, said action was dismissed as to the defendants therein, Rix, Lynch, and Altschul, and by and upon motion of said Mary Polack, said Altschul was not permitted to defend the same for his tenant, James Doyle Jr., and all the title of said Altschul to the premises involved in said action was, upon

like motion, excluded from all consideration in said action, and that Altschul is not in these actions in any manner barred or estopped by the judgment in said former action from asserting his title to said lands. Judgment was rendered for plaintiff in both actions, and from the judgments, and from the orders denying motions for new trial, the cases are here.

Upon these facts, we are asked to hold that Altschul is barred by the recovery by Mary Polack in the former suit, and is estopped from denying that his title was adjudicated and passed upon therein. Various authorities are cited, but counsel for appellant relies mainly upon the decision of this Court in *Gray* v. *Dougherty*, 25 Cal. 266, and *Valentine* v. *Mahoney*, 37 id. 389. The latter case clearly announced the principle, (followed and approved in *Russell* v. *Mallon*, 38 Cal. 259) that if the landlord defends for and in the name of his tenant, and puts his title in issue in aid of his tenant's right of possession, the judgment against the tenant is a bar to a subsequent action by the landlord against the party recovering the judgment, and the landlord is estopped from saying that his title is not adjudicated. So in *Gray* v. *Dougherty:* "It (the former judgment) is not only final as to the subject-matter thereby determined, but also as to every other matter which the parties might have litigated in the cause, and which they might have decided. It must appear, however, that the subject-matter or question was not only the same, but that it was submitted on its merits, and actually passed upon by the Court." So in *Valentine* v. *Mahoney:* "Mann, though not sued, defended the action, and his title was put in issue. In all cases in which the defendant is holding under a lease, and the lessor's title is in issue, it is proper, if not necessary, that the latter (the lessor) should have an opportunity to participate in the defense, for no one is as competent to present and defend his title as he. The landlord ought not to be deprived of the possession by proceedings in which he could take no part." The case proceeded upon the theory that the landlord did in fact take part in the controversy, and that his title was considered and passed upon. SAWYER, J., concurring, said: "It would be dangerous to extend the rule to cases where there is nothing in the record tending to show that the landlord took the defense of the action upon himself. The parties to be

estopped ought certainly to be indicated by the record itself. It is sufficiently manifest from the record in this case, that Mann was the party in interest who made the defense for his own benefit in the name of his tenants." And in *Russell* v. *Mallon*, the question was whether a judgment in an action of ejectment in which the landlord of defendant defends the action for and in the name of his tenant, *and puts his own title in issue*, is admissible in evidence by way of estoppel. Held, yea, on authority of *Valentine* v. *Mahoney*.

Admitting to the fullest extent the reasoning and the conclusions reached in those cases, not only is the appellant not aided thereby, but the record here shows that these cases are not within the principles there decided. Instead of the title of the landlord having been submitted, passed upon, and adjudicated, the landlord, having been made a party defendant, with an allegation of possession on his part, was dismissed from the action, the evidence of his title was stricken out, and the tenants were refused the benefit of that title. The record is not only not silent upon the subject, but it affirmatively appears that the landlord's title was not adjudicated.

It is claimed that as there was evidence tending to show that the landlord was personally present at the trial, employed counsel for himself and his tenants, and practically made whatever defense was made, he was bound by the judgment, because he had a legal right to be heard, and if the Court committed an error in denying him that right, he had an appeal, and his failure to prosecute an appeal was a waiver of his right; and on the argument it was distinctly insisted that, notwithstanding the fact that the plaintiff in the former action dismissed the suit as to Altschul, asked the Court to strike out the evidence of his title, and then objected to the defense of his title being made, thus inviting the Court to make an error, (if it were an error) yet, as Altschul, though no longer a party, did not appeal, he has had his day and is barred. We cannot accede to that proposition. We think that the bare statement of the proposition conclusively shows the answer.

The case of *Windsor* v. *McVeigh*, 3 Otto, 274, though not similar in facts, is parallel in principle, so far as concerns the binding effect of the judgment. In proceedings before a Dis-

trict Court, in a confiscation case, monition and notice having been issued and published, the appearance of the owner, for which they called, when made was stricken out, his right to appear being denied by the Court. Held, that the subsequent sentence of confiscation of his property was as inoperative upon his rights as though no monition or notice had ever been issued. The legal effect of striking out his appearance was to recall the monition and notice as to him. The Court says: "Wherever one is assailed in his person or property, there he may defend, for the liability and right are inseparable. A denial to a party of the benefit of a notice, (*i. e.*, to defend) would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear, and you shall be heard; and when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard. The denial to a party in such a case of the right to appear is, in legal effect, the recall of the citation to him. It was not within the power or the jurisdiction of the District Court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out, and the benefit of the citation to him thus denied. Jurisdiction is the right to hear and determine; not to determine without hearing. And where, as in this case, no appearance was allowed, there could be no hearing or opportunity of being heard, and, therefore, could be no exercise of jurisdiction."

The findings of the Court below, on the other points made by appellant, are sustained by the evidence.

Judgment and order affirmed.

MORRISON, C. J., SHARPSTEIN, J., ROSS, J., MCKEE, J., and THORNTON, J., concurred.

[No. 5,898.—In Bank.]

THE BOARD OF EDUCATION *v.* KEENAN ET AL.

EVIDENCE—PAROLE TESTIMONY TO EXPLAIN RES GESTÆ—LATENT AMBIGUITY—MAP.—In an action of ejectment to recover land, alleged to have been selected as a school lot by the commissioners appointed under certain ordinances of the Common Council of San Francisco, and the Act of March 11th, 1858, ratifying the same, the plaintiff put in evidence the report of the commissioners to the Common Council, and the map accompanying the same, and offered to prove that, before the map and report were filed, the lots selected by the commissioners, and referred to in their report, were colored by them on the map; that such coloring was intended to designate them as school lots; and that the lot in question was one of the lots so colored, and intended to be designated as school lots. To this offer the Court sustained an objection, and refused to permit the witnesses to testify. *Held*, first, that the plaintiff was entitled to prove by witnesses the condition of the map when it was filed, and that this was substantially included in the offer to prove that the lots, referred to in the report of the commissioners, were colored by them before the map and report were furnished to the Common Council; secondly, that parole testimony was also admissible to show that the coloring of the map was done by the commissioners, and the purpose for which it was done: the grounds of the decision being, that the purpose of the act was part of the *res gestæ*, and could therefore be proven by parole testimony; and also, that, it appearing that the purpose of the coloring was to designate the lots as selected for public purposes, there arose a *latent* ambiguity, as to which color was intended to designate the lots selected for school purposes, to remove which, evidence was admissible.

ID.—OBJECTIONS—OFFER OF EVIDENCE.—When an offer is made of a mass of evidence, complex in its character, and the whole of it is objected to, in such case, if any part of it is admissible, it is error to exclude the whole.

ID.—ID.—ID.—CASES DISSENTED FROM AND EXPLAINED.—*Hosley* v. *Black*, 28 N. Y. 444; *Gardner* v. *Barden*, 34 id. 438; *Beebe* v. *Bull*, 12 Wend. 504; *Wharton* v. *Douglass*, 76 Pa. St. 273, to the contrary effect, dissented from; and *Coveny* v. *Hale*, 49 Cal. 552, explained, as approving the rule laid down in this case.

APPEAL from a judgment for the defendants, in the Nineteenth District Court, City and County of San Francisco. WHEELER, J.

John J. Williams, and *W. C. Burnett*, for Appellant.

The plaintiff ought to have been allowed to introduce the testimony offered. (*Fenderson* v. *Owen*, 54 Me. 372; *Hite* v. *The State*, 9 Yerg. 357; *Kell* v. *Charmer*, 23 Beav. 195; *Sweet* v. *Lee*, 3 Man. & G. 452; *Colwell* v. *Lawrence*, 38 Barb. 643; *Wilson* v. *Horne*, 37 Miss. 477; *Kinney* v. *Flynn*, 2 R. I. 319; *Collender* v. *Dinsmore*, 55 N. Y. 205–6; *Dana* v. *Fiedler*, 12 id. 40–6; *Webster* v. *Hodgkins*, 5 Fost. (N. H.) 128; *Early* v.

Wilkinson, 9 Gratt. 74; *Piesch* v. *Dickson*, 1 Mason, 11; *F. & M. Bank* v. *Day*, 13 Vt. 36; *Goldshede* v. *Swan*, 1 Ex. 154; *Shore* v. *Wilson*, 9 Clark & F. 555–556; *Lee* v. *Pain*, 4 Hare, 218; 1 Greenl. Ev. §§ 280–282, 286, 287 n. 3, 288, 289, 300; 2 Whart. Ev. §§ 930, 940, 946, 953, 955; Code Civ. Proc. § 1863; *Sawyer* v. *San Francisco*, 50 Cal. 370 (*res gestæ*); *Barclay* v. *Howell*, 6 Peters, 502; *N. O.* v. *U. S.* 10 id. 713–14; *Birmingham* v. *Anderson*, 40 Pa. St. 513; *Lebanon* v. *Commissioners etc.* 9 Ohio, 80; *Westfall* v. *Hunt*, 8 Ind. 176–7.)

Cope & Boyd, for Respondents.

The evidence offered by the plaintiffs in relation to the coloring upon the map was properly rejected. We concede the admissibility of oral testimony for the purpose of showing the condition of the map at the time it was made; but the offer was not limited in that way, but was also to show the intention of the commissioners in placing upon the map a mark having no significance in itself. (*Withington* v. *Eveleth*, 7 Pick. 106; *Kennebec* v. *Tiffany*, 1 Greenl. 223; *Chesley* v. *Holmes*, 40 Me. 536; *Miller* v. *Travers*, 8 Bing. 249; *Wellington* v. *Gale*, 13 Mass. 488; *Boston R. R. Co.* v. *Midland R. R. Co.* 1 Gray, 366; *Commonwealth* v. *Fitchburg R. R. Co.* 8 Cush. 240; *North British Railway Co.* v. *Tod*, 12 Clark & F. 722; *Squire* v. *Campbell*, 1 Mylne & C. 459; *Collender* v. *Dinsmore*, 55 N. Y. 208; *Comstock* v. *Van Deusen*, 5 Pick. 166; *Senterfit* v. *Reynolds*, 3 Rich. 128; *Dillon* v. *Anderson*, 43 N. Y. 236; *Locke* v. *Whiting*, 10 Pick. 279; *Clayton* v. *Nugent*, 13 Mees. & W. 200; *Shore* v. *Wilson*, 9 Clark & F. 565–7; *Goblet* v. *Beechey*, 3 Sim. 24; *People* v. *S. F. Savings Union*, 31 Cal. 136; *Keane* v. *Cannovan*, 21 id. 302; *Gibson* v. *Williams*, 4 Wend. 326; *Madden* v. *Tucker*, 46 Me. 376; 1 Greenl. Ev. §§ 277, 288.)

The evidence was offered as a whole, and if any part of it was incompetent, no error was committed in rejecting it.

McKEE, J.:

The action is ejectment, in which the plaintiff seeks to recover possession of the premises in controversy as a school lot, situate

in the city of San Francisco, which, it is claimed, has been selected by the city of San Francisco under the provisions of certain ordinances, which have been passed by the Common Council of the city and been ratified and confirmed by an act of the Legislature, entitled: "An Act concerning the City of San Francisco, and to ratify and confirm certain ordinances of the Common Council of said city"; approved March 11th, 1858.

At the trial in the court below, the plaintiff introduced in evidence the ordinances referred to, the act of the Legislature, the appointment of commissioners to select and set apart lots for school-houses, hospitals, fire-engine houses, and public squares for the use of the city, in that part of the city west of Larkin Street and south-west of Johnson Street, the report of said commissioners to the Common Council, the map to which it referred, together with other evidence tending to show in the plaintiff a right of entry upon the lot in question. Defendants admitted that the lot was in that portion of the city west of Larkin Street and south-west of Johnson Street; that they were in possession of it at the commencement of the action, and that it was not within any exception or reservation mentioned in the decree of confirmation of lands to the city of San Francisco. The plaintiff then offered to prove, by witnesses in court, that the lots selected by the commissioners, and referred to in their report, were colored by them upon the map accompanying their report; that such coloring was intended to designate them as school lots; that the lot in question was one of the lots so colored, and intended to be designated as school lots, and that this coloring and designation were done before the map and report were furnished to the Common Council. To this offer, the Court sustained an objection, and refused to allow the witnesses to testify, and that ruling is assigned as an error.

If no objection had been made to the offer, the Court below would have permitted the plaintiff to introduce the testimony of the witnesses. The defendants, however, objected to the offer, not on any formal grounds, but on the ground that the testimony offered was hearsay, incompetent, and contradictory of the map; and the question presented to the Court for determination was, whether the proposed testimony was subject to the objections urged against it. It was in this view that the attention of the Court was called to it.

"As a general rule," says the Supreme Court of the United States, "we think that the party ought to be confined, in examining the admissibility of evidence, to the specific objections taken to it. The attention of the Court is called to the testimony in that point of view only." (*Hinde's Lessee* v. *Longworth*, 11 Wheat. 199; *Burton* v. *Driggs*, 20 Wall. 125.) So in *Coveny* v. *Hale*, 49 Cal. 552, where a defendant offered in evidence a mass of papers to prove that a promissory note, mentioned in an inventory, was the separate property of a married woman, and the objection was, that the papers which were offered were irrelevant, immaterial, and not proof of the fact, it was held that the objection was too broad. The question, then, here, as it was in the court below, is, was the testimony offered hearsay, incompetent, or contradictory of the map in evidence.

In the report which the commissioners made to the Common Council of the city, and which was part of the evidence in the case, the commissioners say that they had selected the lots and squares for school, fire, and hospital, and other public purposes; that the number of school lots selected was twenty-eight, and their size one hundred and thirty-seven and a half feet square, except those located on the Potrero, which are one hundred feet by two hundred feet; and that they had adopted the accompanying plan or map, on which were described the streets as laid out and the lots and squares selected for public purposes. This plan or map was approved and adopted by the Common Council, and their action was afterward ratified and confirmed by the Legislature of the State; and it is the same map which is in evidence in the case.

It is claimed that certain lots delineated on this map and indicated by certain figures inscribed thereon, were selected by the commissioners as school lots, for the use of the city, by coloring them with different colors. On the map, certain lots are described, within the lines of which are written certain numerals, the meaning of which the Court below, on the trial of the case, announced it would recognize. The lot in controversy appears on the map to be colored brown. Other lots of similar color are also to be found on the map; but in its condition when presented as evidence in the case, the map itself did not show coloring of many or most of the lots claimed to have been se-

lected for the use of the city. The coloring, if it ever existed, had become obscured or effaced by time, or from some other cause; and the first question included in the offer was, whether parole evidence was admissible to show that the lots, indicated on the map by the numerals within their lines, were, in fact, colored by the commissioners at the time when the map was made and filed, and became the official map of the city.

If this fact existed at the time when the map was made and became official, it was part of the condition of the map, and of the description of the lots designated thereon. For the map itself shows by a certificate indorsed thereon by the commissioners, that it was made "for the location and dimension of the streets to be laid out west of Larkin Street and south-west of Johnson Street, with the lots of ground selected and set apart for the several public uses as herein designated." By this authentic act it is evident that the map contains the lots or grounds selected and set apart by the commissioners for the several public uses referred to in the Van Ness Ordinance. But how were they designated? If by coloring, and the coloring has disappeared from many of them, it would be competent to show these facts by the testimony of witnesses which would restore the map to its original condition. Such testimony would not be hearsay or incompetent, or contradictory of the map. It would be simply explaining the map, and placing it as evidence before the Court in the legible condition in which it was when it left the hands of its authors, and was approved, adopted, and ratified by the lawful authorities. Parole evidence in aid or explanation of an authentic act is always admissible. The efficacy of such testimony is shown in the case of the *Board of Education* v. *Donahue*, 53 Cal. 190. In that case, the report and map of the commissioners referred to in the offer made in this case, were considered by the late Supreme Court. Parole testimony had been taken at the trial in the District Court to show that certain lots designated on the map had been colored by a draftsman by the direction of the commissioners; and upon such testimony, in connection with the report and map, a majority of the Judges of the Court held that it was the intention of the commissioners to indicate that these colored lots on the map were selected as school lots for the use of the city, and the

other Judges, in concurring, held that the oral testimony established the condition of the map when it was filed and at the time when it became, by law, the official map, and that a reference to and inspection of the report and map sufficiently identified the lots selected by the commissioners.

We therefore think that it was competent for the plaintiff to prove by witnesses the condition of the map when it was filed, and that this was, substantially, included in the offer to prove that the lots on the map referred to in the report of the commissioners were colored by the commissioners, and that this was done before the map and report were furnished to the Common Council.

But it is urged that if that part of the testimony was admissible, the offer as an entirety was bad, because it was an offer good in part and bad in part, and there was no error committed in sustaining the objection to it as an entirety. We have been referred to several decisions of courts where that seems to be the rule. Upon the subject there is, unquestionably, a conflict of opinion. In New York and Pennsylvania it has been held that if an offer contains any matter not admissible as evidence, the whole may be rejected. (28 N. Y. 444; 34 id. 438; 12 Wend. 504; *Wharton* v. *Douglass*, 76 Pa. St. 273.) But in Alabama and Maryland and in the Supreme Court of the United States, the contrary is held to be the more correct rule.

In *Buffington* v. *Cook*, 39 Ala. 64, a motion was made to exclude from the jury all the indorsements on an execution; but a part of them was legal evidence, and the Supreme Court say: "If a portion of the testimony was illegal, the Court was not bound to separate the legal from the illegal evidence, but might properly overrule the whole motion." In *Carroll's Lessee* v. *The Granite Manufacturing Company*, 11 Md. 403, and *Curtis* v. *Moore*, 20 id. 96, the rule is thus declared: When an offer is made of a mass of evidence, complex in its character, and the whole of it is objected to, in such case, if any part of it is admissible, it is error to exclude the whole. In *Moore* v. *The Bank of the Metropolis*, 13 Peters, 302, which was an action in assumpsit upon a promissory note, the plaintiff, after proving by a competent witness that the defendant, before the making of the note in suit, had made several promissory notes which were

discounted by the bank, and the proceeds of which were carried to the credit of the defendant, who drew the money by checks drawn on the bank, and that those notes remained in the bank unpaid until canceled by renewal under a power of attorney which the defendant had executed for that purpose, and that the note in suit was given for the purpose of renewal of the last one of these notes. The plaintiff then offered the canceled notes and bank checks and power of attorney in evidence, to the admissibility of which, or any of the matters above stated in evidence, the defendant objected; but the Court overruled the objection and permitted all of them to be given in evidence, and on appeal, the Supreme Court of the United States says: "It is the duty of a party taking exceptions to the admissibility of evidence to point out the part excepted to, when the evidence consists of a number of particulars, so that the attention of the Court may be drawn to the particular objection. If the exception covers any admissible evidence it is rightly overruled."

We think these cases establish the correct rule on the subject. No injustice can be done by working under such a rule, for the trial court has it within its power to decide upon the admissibility of any part of the testimony included within an offer, when the witnesses are called upon to testify; or if any admitted part of it should be objectionable, it has the power to strike it out on motion. As a rule, we think it has been indirectly, at least, approved by the Court in the case of *Coveny* v. *Hale*, *supra*.

But, independent of this, we think the offer, as an entirety, was not obnoxious to the objections which were made to it; for if the map, upon being restored to its original condition, disclosed the fact that certain lots designated upon it were colored, it would be admissible to show, by extrinsic evidence, that the act was done by the commissioners, and the purpose for which it was done. For the purpose of an act is part of the act itself —*pars rei gestæ;* and may be proved by the simultaneous circumstances, and oral or written declarations of the actors. It may be a difficult matter at times, to determine whether proposed circumstances, or declarations of a person, constitute a part of the transaction; but the principal things for consideration are: Were they contemporaneous with the act in evidence?

And are they so connected with it as to illustrate its character? If they were contemporaneous, and are so connected with the act as to illustrate its character, they are admissible as a part of it.

Wharton defines *res gestæ* as those circumstances which are the undesigned incidents of a particular litigated act, which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone, as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for, or emanations of such act, and are not produced by the calculated policy of the actors.

Upon the same principle rest the declarations of agents or officers of corporations made at the time of the particular transaction, while acting within the scope of their duties.

Now, if from the contemporaneous circumstances of the act of coloring the lots, it be made to appear that the purpose of the commissioners was to designate them as lots selected by them for public purposes, and that these lots so designated were painted with different colors, a doubt would arise as to which color was intended to designate those selected for school purposes. To obviate that doubt, oral evidence of the circumstances connected with the selection and designation, tending to identify the lots which were selected for school purposes, would also be admissible. The coloring, instead of being an arbitrary and unmeaning act, is the expression of an intention, and when the intention and expression are connected, they attach to the objects on which the expression appears; and it is the province of the Court to apply them so as to determine which of the expressions was intended to designate the lots selected for school purposes, and whether the lot in controversy was one of them. The mode of designation is applicable to two or more subjects; and, where that is the case, extrinsic evidence is admissible to prove which of such subjects was intended.

The general rule on the subject will be found stated by Mr. Greenleaf in his work on Evidence. If the language of an

instrument is applicable to several parcels of land, to several monuments or boundaries, * * * or if the terms are vague or general, or have several meanings, or if the description of any thing or circumstance is true in part, but not true in every particular, parole evidence is admissible of any extrinsic circumstance tending to show what things were intended, or to ascertain the meaning in any other respect. (1 Greenl. Ev. §§ 288, 289.) And proof of all material facts is admissible, from which the intent of the party in using the expressions may be inferred, or which will enable the Court to identify the thing meant to be designated.

We are, therefore, of opinion that the facts which the plaintiff offered to prove, taken in connection with the other facts already in evidence, were relevant to the issues on trial by the Court, and that the Court erred in refusing to admit testimony to prove them. Whether the testimony, when admitted, would be sufficient or insufficient to prove the fact of selection and designation by the city of the lot in question, under the ordinances in evidence, was for the consideration of the Court when it came to pass upon the rights of the persons to the action.

Judgment and order of nonsuit reversed, and cause remanded for a new trial.

MYRICK, J., and SHARPSTEIN, J., concurred.

ROSS, J., concurred in the judgment, upon the ground first discussed in the opinion of Mr. Justice MCKEE.

MCKINSTRY, J., dissenting:

In *Board of Education* v. *Donahue*, 53 Cal. 196, I had occasion to say: "A reference to, and inspection of, a report and map—the *colors* on the latter being restored—sufficiently identify the lots selected by the commissioners as school lots." But, while the plaintiff in the present case, if such an offer had been made, should have been permitted to prove the colors of the map when it was filed, the offer to prove what the commissioners *intended* by the different colors was, in my opinion, properly refused. If such testimony was inadmissible, I feel confident it was not error to reject the offer made *in gross*. It

is admitted that the decisions in New York and Pennsylvania would justify the action of the Court from which this appeal is taken. In Maryland, it would appear to have been held otherwise. In *Moore* v. *The Bank of the Metropolis*, 13 Peters, and *Buffington* v. *Cook*, 39 Ala.—cited in the prevailing opinion—it was simply held that where evidence had been admitted without objection, and a party moved to exclude *the whole* of such evidence, the trial court properly denied the motion—it appearing that a portion was admissible.

I conceive that the rule, as laid down in New York, is fairer to the lower courts, and would better protect the rights of suitors. I am, therefore, compelled to dissent from the judgment.

[THORNTON, J., being disqualified, took no part in the decision of this case.]

[No. 7,307.—In Bank.]

SCHMITT *v.* DUNN.

BOARD OF ELECTION COMMISSIONERS — REGISTRAR OF VOTERS — APPOINTMENT OF OFFICERS.—Under the Act of March 18th, 1878, "to regulate the registration of voters, etc., in the City and County of San Francisco," the Board of Election Commissioners has power to fix the number of clerical assistants to be employed by the Registrar; but the power of selecting and employing such assistants is vested in the Registrar.

ID. — ID. — ID. — ALLOWED — PROVIDED. — The meaning of these terms construed.

MANDAMUS to John P. Dunn, Auditor of the City and County of San Francisco, to compel him to allow a claim of the plaintiff, Henry Schmitt, for salary as clerk.

The plaintiff was appointed by the Board of Election Commissioners, under the act referred to in the opinion, as clerical assistant to the Registrar.

W. T. Baggett, *Thos. B. Bishop*, *Jos. P. Hoge*, *W. W. Cope*, *Frank G. Newlands*, and *C. R. Greathouse*, for the Plaintiff.

W. H. L. Barnes, for Respondent.

The COURT:

In this cause the Court is unanimously of opinion that it is the duty and within the power of the Board of Election Commissioners, under the Act of the Legislature of March 18th, 1878, to determine what necessary clerical assistance the Registrar of Voters may require for the efficient discharge of his duties under the act; that the board has power to fix the number of clerical assistants to be employed by the Registrar for the purpose mentioned above, and to fix the rate of compensation to be paid to them; and the duty and power to select and employ such assistants under this act is vested in the Registrar; and that the board has no power or authority to select or employ any one of such assistants.

The Court is also of opinion that the clerks and other assistants mentioned in the 29th section of the act, "to be provided by the Board of Election Commissioners," are to be appointed by the board for the purposes indicated in that section.

The Court is further of the opinion that the Registrar, and not the board, has power to appoint the clerks mentioned in the third section of the act.

The writ of mandate is denied.

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ACCOUNT. See ESTATES OF DECEASED PERSONS, 5, 6, and 7.

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ACTION FOR TAKING PERSONAL PROPERTY.

ACTIONS FOR PERSONAL PROPERTY.

1. ACTION FOR TAKING PERSONAL PROPERTY—TRESPASS DE BONIS ASPORTATIS—PLEADING—EVIDENCE.—In an action for the taking of personal property—the plaintiff alleging ownership and possession of the property, and a taking by the defendant, and the answer consisting of a general denial—no evidence is admissible except as to the ownership and taking.—*Pico* v. *Kalisher*, 153.
2. ACTION TO RECOVER PERSONAL PROPERTY—PLEADING—ANSWER—FRAUD.—In an action for the recovery of personal property, the complaint alleged ownership and a taking by defendant; and the defendant in his answer denied the ownership, and justified the taking, under an execution issued to him as Sheriff, against one L. *Held*, that the defendant was not bound to anticipate the case of the plaintiff, or to assume that he claimed as vendee of L., and that the answer averred all that was necessary to make up the material issues.—*Grum* v. *Barney*, 254.
3. ID.—SALE OF PERSONAL PROPERTY—DELIVERY—CHANGE OF POSSESSION—FRAUD.—In the same action, it appeared that L., being the owner of the property in controversy, consisting of horses and hay, sold and delivered the same to the plaintiff, and at the same time leased to him the ranch on which the property was, and of which the plaintiff, as the servant of L., had for some time been the sole actual occupant; and that the property remained upon the ranch until taken by the defendant. *Held*—the jury having found for the plaintiff, and the Court having granted a new trial—that there was no apparent change in the mode of the plaintiff's occupation, when he ceased to be the servant of L. and became his lessee, and that the Court below did not err in granting a new trial.—*Id.*

ACTIONS FOR PERSONAL PROPERTY (Continued).

4. ACTION TO RECOVER PERSONAL PROPERTY—PLEADING—JUSTIFICATION—EVIDENCE—FRAUD.—In an action to recover personal property, where the defendant justified as Sheriff under a judgment and execution against the plaintiff's vendor—whose property the answer alleged the goods to be—the Court, on the ground that fraud had not been specially pleaded, excluded from the evidence the judgment roll under which the defendant justified, and also evidence tending to show that the sale by the judgment debtor, under which the plaintiff claimed, was not followed by an actual and continued change of possession. *Held*, that the defendant was not bound to anticipate the case of the plaintiff, or to assume under whom he would claim title, and that the ruling of the Court was therefore erroneous.—*Humphreys* v. *Harkey*, 283.

See GUARDIAN AND WARD, 6.

ACTION TO QUIET TITLE.

1. ACTION TO QUIET TITLE—EQUITY—RETURN OF CONSIDERATION—MAXIM.—A plaintiff cannot come into a Court of Equity, and ask for a decree debarring the defendant from asserting a claim under an instrument executed by the former, without restoring the consideration received by him.—*Chandler* v. *Chandler*, 267.

2. ID.—ID.—DEED—BARGAIN AND SALE—STATUTE OF USES.—The plaintiff, and his wife, in the year 1869, executed to the defendant a deed whereby, in consideration of the sum of $2,000, they granted, bargained, and sold to the defendant and his heirs and assigns forever, a certain tract of land; but it was expressly provided, and the deed was made upon the express condition, that the parties of the first part should have and retain the entire use and control of the said demised premises, so long as they, or either of them, should live. In an action to quiet title, brought by the plaintiff against the defendant, this deed was adjudged to be void, and the plaintiff's title to be good.

Upon appeal, *held*—assuming that the deed was inoperative as a common-law conveyance, because an attempt to create or convey a freehold to commence *in futuro:*

1st. That a freehold to commence *in futuro* could be created by a *bargain and sale*, operating under the Statute of Uses; and that, if the Statute of Uses was part of our law, prior to the Codes, the deed was valid.

2nd. That, if the Statute of Uses was not in force in this State when the deed was executed, the bargain and sale would be recognized and enforced in a Court of Equity, as it would have been before the statute.

3rd. That in either case, the Court, as a Court of Equity, had power to settle and determine the actual rights of the parties, and prevent future complications, by decreeing a formal conveyance of the fee from the plaintiff to the defendant, and a reconveyance for the life of the former by the latter, and this should have been done.—*Id.*

3. ACTION TO QUIET TITLE—PUBLIC LAND—PRIOR POSSESSION.—In an action to quiet title, brought by the grantee in a constable's deed made upon an execution sale, in an action against one in possession of the land, it appeared from the plaintiff's evidence that the land was public land, and the Court granted a nonsuit on that ground. *Held*, that the Court erred; that the defendant, having shown no title whatever, could not rely upon an outstanding title in the United States.—*Wilson* v. *Madison*, 5.

4. ID. ID.—ID.—The legislation of the State from the beginning has treated the possession of public land as legal, and as vendible under execution, and has protected the title of the purchaser.—*Id.*

See ASSESSMENT, 2; CROSS-COMPLAINT; FRAUD AS TO CREDITORS, 1.

ADMINISTRATOR. See ESTATES OF DECEASED PERSONS, 5, 6, and 7; GUARDIAN AND WARD, 5; PROMISSORY NOTE, 3.

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ADVERSE POSSESSION. See EJECTMENT, 2; ESTOPPEL, 3; STATUTE OF LIMITATIONS, 2.

AFFIDAVIT OF MERITS. See CHANGE OF PLACE OF TRIAL, 1.

AGENCY. See CONSTRUCTION OF CONTRACT, 2.

AGENT. See CORPORATION, 2; FACTOR 1, 2, and 3; INSURANCE.

AGREEMENT. See CONTRACT, 1.

ALLOWED. See ELECTION COMMISSIONERS, 2.

ALTERATION. See EVIDENCE, 1.

AMBIGUITY. See EVIDENCE, 13.

AMENDED COMPLAINT. See FICTITIOUS NAME.

AMENDMENT. See TRAYLOR ACT, 3.

ANSWER. See DIVORCE 3; ACTIONS FOR PERSONAL PROPERTY, 2; PLEADING, 1, 4.

APPEAL.

1. APPEAL—ENTRY OF JUDGMENT.—The appeal in this case dismissed, because taken before the entry of judgment.—*Thomas* v. *Anderson*, 43.
2. APPEAL—ESTATES OF DECEASED PERSONS.—An appeal does not lie from an order denying a petition for the revocation of letters.—*Estate of Montgomery*, 210.
3. APPEAL—JUDGMENT BY DEFAULT—JUDGMENT ROLL—JURISDICTION.—In case of a judgment by default, the summons, with the affidavit or proof of service, and the complaint, with the memorandum of default, constitute a part of the judgment roll, and the question whether there was error in the entry of the default of the defendants before the expiration of ten days from the service of summons upon them, can be considered on an appeal from the judgment.—*Maud* v. *Wear*, 25.
4. APPEAL—JUDGMENT ON APPEAL—MODIFICATION OF JUDGMENT.—Cause remanded, with directions to modify the judgment by deducting an amount improperly found by the Court to be due to the plaintiff for taxes, and included in the judgment.—*Kern Valley Bank* v. *Chester*, 49.
5. APPEAL—PARTY AGGRIEVED—DEFINITION—ESTATES OF DECEASED PERSONS. —Upon an appeal from an order directing a resale of real property, which had been previously sold by the administratrix, and confirmed to the appellant as purchaser, *held*, that the appellant, though not an actual party to the proceedings in the Court below, was a party aggrieved, and entitled to appeal under §§ 969 and 938 of the Code of Civil Procedure.—*Estate of Boland*, 310.
6. APPEAL—SERVICE OF NOTICE—ATTORNEY—DEFINITION—DISMISSAL OF APPEAL.—The attorney referred to in § 940 of the Code of Civil Procedure (in the clause requiring the notice of appeal to be served "on the adverse party or his attorney") is the *attorney of record*, and a notice served upon any other, unless the objection is waived, is void.—*Whittle* v. *Renner*, 395.

APPEAL (Continued).

7. APPEAL—UNDERTAKING.—An appeal from a judgment is well taken, if the notice is filed within the year, and the undertaking (though after the expiration of the year) within the period prescribed by the Code.—*Lowell* v. *Lowell*, 316.
8. ID.—CASE COMMENTED UPON.—The case of *Holcomb* v. *Sawyer*, 51 Cal. 417, was decided to this effect on rehearing, and the original opinion was reported by mistake.—*Id.*

See APPEARANCE, 2; CLAIMS AGAINST A CITY, 2, 5, and 6; JURISDICTION, 1; PRACTICE, 1, 3.

APPEARANCE.

1. APPEARANCE.—In an action against several defendants—one of whom had not been served with summons—a demurrer was served and filed, beginning with the words, "And now come the defendants, etc.," and signed C. P. & S., "attorneys for defendants": *Held*, that this was an appearance of all the defendants under the express provisions of the Code. (Code Civ. Proc. § 1014.)—*Rowland* v. *Coyne*, 1.
2. APPEARANCE—CRIMINAL LAW—ESCAPE—APPEAL—CONSTITUTIONAL LAW.—Under the provisions of the Constitution, and of the Penal Code, a person charged with crime can appear and defend only when in actual or constructive custody, and has no longer a right to appear by counsel, when he has escaped from custody and is at large. Accordingly, where a defendant, convicted of murder, appealed, and afterward escaped from jail it was ordered that the appeal should stand dismissed, unless the defendant should return to custody within a time specified.—*People* v. *Redinger*, 290.

See DIVORCE, 1.

APPLICATION TO PURCHASE. See STATE LANDS, 5.

APPOINTMENT OF OFFICERS. See ELECTION COMMISSIONERS, 1 and 2.

ASSAULT.

1. ASSAULT WITH INTENT TO KILL—DRUNKENNESS AS JUSTIFICATION.—Drunkenness is never an excuse for crime, except where it is continued so long and been carried to such an excess as to produce *delirium tremens* or some other form of permanent insanity; but whenever the actual existence of a particular intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the intent with which he committed the act.—*People* v. *Ferris*, 588.
2. ID.—ID.—An instruction of the Court upon the trial of an indictment for an assault with intent to kill, to the effect that evidence of drunkenness on the part of the defendant, while clearly admissible under the law, should be received with great caution, *held*, not to be erroneous.—*Id.*

ASSESSMENT.

1. ASSESSMENT—DESCRIPTION—TAX SUIT.—A description sufficiently certain to convey land, between man and man, and which, if contained in an agreement to convey, would authorize a Court of Equity to decree a specific execution, may not answer in a proceeding to enforce the collection of a tax. In the latter case the description must be certain of itself, and not such as to require evidence *aliunde* to render it certain. *Held*, accordingly, that an assessment, one of the calls of which was, "* * * north by the lands of James Reagan *and others*," was void; and so *held*, also, with reference to an

ASSESSMENT (Continued).

assessment, which described the land as "bounded * * * south by the lands of Felton and Patterson."—*People* v. *Mahoney*, 286.

2. ASSESSMENT—TAX DEED—ACTION TO QUIET TITLE.—In an action to quiet title, in which the defendant claimed under a tax sale and deed, and the plaintiff under a deed from parties doing business under the name of "The Blue Range Mining Company," it appeared that the property was assessed to "*The Blue Range Mining Company*" by direction of the plaintiff's agent, and that the certificate of sale and tax deed each recited the assessment as made to "*The Blue Range Mining Company*, and to all *owners and claimants known and unknown.*" *Held*, first, that the assessment was void, because "The Blue Range Mining Company" was not the owner, and was not a person who could own; and, secondly, that the certificate and sale were void for the additional reason that they recited an assessment to "The Blue Range Mining Company, *and to all owners and claimants known and unknown.*"—*Hearst* v. *Egglestone*, 365.
3. ID.—ID.—Under § 388 Code of Civil Procedure, where two or more persons transact business under a common name, they may be sued by the common name; but this does not vary the terms of § 3628 Political Code, by which the assessor "must assess such property to the persons who own, claim, or have the control thereof.—*Id.*
4. ID.—ID.—A void tax deed cannot be made valid by proof of a valid assessment.—*Id.*

ASSESSMENT ROLL. See DISTRICT SCHOOL TAX.

ASSIGNEE. See PROMISSORY NOTE, 5.

ASSIGNMENT. See INSURANCE; MORTGAGE, 2; NON-NEGOTIABLE CONTRACT; PROMISSORY NOTE, 3.

ASSOCIATE COUNSEL. See ATTORNEY OF RECORD.

ASSUMPSIT. See PLEADING, 2.

ASYLUM FOR THE DEAF, DUMB, AND BLIND. See CONSTRUCTION OF STATUTES, 3.

ATTACHMENT.

1. ATTACHMENT—CONTRACT PAYABLE IN THIS STATE—DEFINITION.—If a contract is not made in this State, there must be an express stipulation that it shall be paid in this State, in order to authorize the issuance of an attachment in an action upon it, (under § 537, subd. 1, Code Civ. Proc.)—*Eck* v. *Hoffman*, 501.
2. ID.—RESIDENCE.—The defendants, upon the facts stated in the opinion, *held* to be residents of this State.—*Id.*
3. ATTACHMENT—RECORD OF DEED.—A writ of attachment is not an "instrument," within the sense of that term as used in § 1107 of the Civil Code of California; and therefore, a deed, executed prior to the levy of an attachment upon the property conveyed, though not recorded until after the levy, will prevail over the attachment.—*Hoag* v. *Howard*, 564.
4. ATTACHMENT—RETURN—PRESUMPTION.—A return upon an attachment, (or other mesne process) that the officer duly levied the same, is defective in not stating the acts done by the officer in making the service; but such a return is *prima facie* sufficient to show a due execution, though the presumption may be controverted.—*Porter* v. *Pico*, 165.

ATTACHMENT (Continued).

5. ID.—ID.—ID.—CONFLICT OF EVIDENCE—FINDINGS.—In such a case, where the officer testified that it was his custom to levy the attachment by first posting the attachment, with the notice of levy, upon the land, and afterward filing the same in the Recorder's office, (being the reverse of the order prescribed by the statute): *Held*, there was a conflict of evidence, and the finding of the Court, that the attachment was duly levied, was conclusive. —*Id.*
6. ID.—IRREGULARITY.—The lien of an attachment is not affected by any irregularities in the attachment: but such irregularities are waived by the defendant when he appears, and answers, without taking advantage of them by motion or otherwise.—*Id.*
7. ATTACHMENT—UNDERTAKING—BANKRUPTCY—JURISDICTION—SURETY.—In an action against the sureties in an undertaking given (under § 540 Code Civ. Proc.) to prevent the levy of an attachment upon the property of the defendant in the attachment suit, it appeared that the latter, within four months of the issue of the attachment, filed his petition in bankruptcy, and in due course made an assignment of his property; but that, intermediate the filing of the petition and the assignment, judgment by default was entered against him. *Held*, that proceedings in bankruptcy did not affect the jurisdiction of the District Court, and its judgment was therefore valid, and the plaintiff entitled to recover.—*Goodhue* v. *King*, 377.

See INJUNCTION, 4; SHERIFF'S DEED, 3.

ATTORNEY, DISBARRING OF.

1. DISBARRING OF ATTORNEY—UNPROFESSIONAL CONDUCT.—*People ex rel. Burridge* v. *Pearson*, 472.

See APPEAL, 6; DIVORCE, 6.

ATTORNEY AND COUNSELLOR OF SAN FRANCISCO. See CLAIMS AGAINST CITY, 2.

ATTORNEY OF RECORD.

1. ATTORNEY OF RECORD—ASSOCIATE COUNSEL—SERVICE.—The complaint was signed, "G. D. B., plaintiff's attorney." On the trial G. D. B. and H. V. R. appeared as counsel for the plaintiff. Service of motion for a new trial was accepted by "H. V. R., one of the attorneys for the plaintiff." Service of notice of appeal was admitted by "G. D. B. and H. V. R., plaintiff's attorneys." Service of the transcript was admitted by "G. D. B. and H. V. R., attorneys for plaintiff and respondent." Transcript was indorsed "G. D. B., Esq., and H. V. R., Esq., attorneys for respondent," and briefs filed with similar indorsements. Then G. D. B. files a separate brief, making the point that the notice of motion for new trial had not been served upon himself as attorney of record. *Held*, that the objection came too late.—*Sowden* v. *Idaho Quartz Mining Company*, 443.

See APPEAL, 6; DIVORCE, 6.

ATTORNEY'S FEE.

1. ATTORNEY'S FEE—PLEADING—EXHIBIT.—In an action for the foreclosure of a mortgage, the complaint contained no allegation as to attorney's fee, further than the allegation of the execution of the mortgage; but a copy of the mortgage, which contained a stipulation for an attorney's fee, was attached to the complaint. *Held*, there was no error in allowing an attorney's fee.—*Kern Valley Bank* v. *Chester*, 49.
2. ID.—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.—The facts stated in an

ATTORNEY'S FEE (Continued).
affidavit of newly-discovered evidence, on motion for a new trial, *held* not to disclose sufficient grounds for granting the motion.—*Id.*
See FORECLOSURE; INJUNCTION, 1.

BAILEE. See CONVERSION.

BANKRUPT ACT. See INSOLVENCY, 2, 5.

BANKRUPTCY. See ATTACHMENT, 7.

BARGAIN AND SALE. See ACTIONS, 3.

BARRATRY. See PROMISSORY NOTE, 1.

BILL OF EXCEPTIONS.
1. BILL OF EXCEPTIONS.—A bill of exceptions settled and agreed to by the attorneys, but not signed by the judge, *held* to be insufficient, and the judgment affirmed.—*Gee* v. *Terrio*, 381.
2. CRIMINAL LAW—PRACTICE—BILL OF EXCEPTIONS.—The case was tried by one judge, and the motion for new trial heard by his successor in office. *Held*, on appeal from a judgment of conviction and an order denying a new trial, that the bill was properly settled and authenticated.—*People* v. *Hodgdon*, 72.
PRACTICE, 3.

BILL OF PARTICULARS. See MURDER, 3.

BOARD OF EXAMINERS. See STATE LIBRARY, 2.

BOARD OF FREEHOLDERS. See SAN FRANCISCO, CHARTER OF, 2, 4.

BOARD OF SUPERVISORS.
1. BOARD OF SUPERVISORS—CLAIM AGAINST COUNTY—INJUNCTION.—The Board of Supervisors, in passing upon a claim against the county, act as a *quasi*-judicial body, and their allowance and settlement of the claim is an adjudication, which is conclusive.—*Colusa County* v. *De Jarnett*, 373.
See SAN FRANCISCO, CHARTER OF, 2, 3, 4.

BOND. See CONTRACT, 2.

BOUNDARY. See DESCRIPTION IN DEED.

BUILDING. See MECHANICS' LIEN, 5.

BURGLARY. See INDICTMENT; INSTRUCTIONS, 7, 8.

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Erwin *v.* Schriver, 19 Johns. 379, explained, p. 536.
Fisher *v.* Eslamann, 68 Ill. 78, explained, p. 531.
Gardner *v.* Barden, 34 N. Y. 438, dissented from. See EVIDENCE, 15.
Holcomb *v.* Sawyer, 51 Cal. 417, explained. See APPEAL, 8.
Hosley *v.* Black, 28 N. Y. 444, dissented from. See EVIDENCE, 15.
Kirkham *v.* Dupont, 14 Cal. 559, explained, p. 531.
Montgomery *v.* Tutt, 11 Cal. 317, explained, p. 531.

CASES OVERRULED (Continued).
Murray ex parte, 43 Cal. 455, criticised. See HABEAS CORPUS, 1.
Watkins ex parte, distinguished, p. 215.
Wharton *v.* Douglas, 76 Pa. St. 273, dissented from. See EVIDENCE, p. 15.
Whitney *v.* Higgins, 10 Cal. 554, explained, p. 531.

CATTLE. See EVIDENCE, 6.

CHANGE OF PLACE OF TRIAL.
1. CHANGE OF PLACE OF TRIAL—AFFIDAVIT OF MERITS.—Upon a motion to change the place of trial, in an action against a Sheriff and his sureties, on the ground that the action was not brought in the proper county: *Held*, that the affidavit of merits (quoted in the opinion) was sufficient; and also, that it was not necessary for affidavits to be filed by the other defendants. —*Rowland* v. *Coyne*, 1.
2. CHANGE OF PLACE OF TRIAL—INSOLVENCY PROCEEDINGS—JURISDICTION.—*Creditors* v. *Welch*, 469.

CHANGE OF POSSESSION. See INSTRUCTIONS, 3; ACTIONS FOR PERSONAL PROPERTY, 3.

CHARACTER. See IMPEACHMENT.

CHARITY. YOSEMITE VALLEY GRANT, 1.

CHARTER. See SAN FRANCISCO, CHARTER OF.

CHARTER PARTY. See FACTOR, 3.

CHATTEL MORTGAGE. See DELIVERY.

CITY. See CLAIM AGAINST.

CITY AND COUNTY GOVERNMENTS. See CONSOLIDATED, ETC.

CLAIM. See ESTATES OF DECEASED PERSONS, 2; STATE LIBRARY, 2.

CLAIM AGAINST CITY.
1. CLAIM AGAINST A CITY FOR INJURIES CAUSED BY MOBS OR RIOTS.—A claim for damages for injuries to property, caused by a mob or riot, (in the City and County of San Francisco) is not to be presented in the first instance to the Board of Supervisors for allowance, as in the case of other claims, but a judgment must first be had, and thereupon the board *must* order it to be paid, unless they shall determine to appeal.—*The Bank of California* v. *Shaber*, 322.
2. ID.—ATTORNEY AND COUNSELLOR OF THE CITY AND COUNTY OF SAN FRANCISCO—APPEAL.—The Attorney and Counsellor of the City and County of San Francisco, while he holds his office by a tenure independent of the board, cannot act independently or against the directions of the board; and *held*, accordingly—where the board had determined by ordinance not to appeal from a judgment against the city and county for damages, caused by a mob or riot, and had ordered the payment of the same—that an appeal taken by the Attorney and Counsellor was without authority, and did not stay the enforcement of the order of the board.—*Id.*
3. ID.—ESTOPPEL.—*Held, further*, that the order of the board, directing the payment of the judgment, operated as an estoppel upon the city and county, as against an assignee for value, who purchased the claim, relying upon the action of the board.—*Id.*

CLAIM AGAINST CITY (Continued).

4. ID.—MANDAMUS.—And *held, further*, that upon the refusal of the County Treasurer to pay the claim, *mandamus* was the proper remedy.—*Id.*
5. ID.—APPEAL—STAY OF PROCEEDINGS—MANDAMUS.—ROSS, J., (dissenting) was of the opinion, that the appeal by the City and County Attorney could not be treated as a nullity, and that, pending the appeal, the Treasurer could not, by mandamus, be compelled to pay the claim.—*Id.*
6. ID.—ID.—ID.—ID.—SHARPSTEIN, J., and MCKEE, J., (also dissenting) were of the opinion that *mandamus* could not be maintained: 1st, because the appeal, though improperly taken, operated as a stay; and 2ndly, because the petitioner had a plain, speedy, and adequate remedy, by a motion to dismiss the appeal.—*Id.*

CLAIM AGAINST COUNTY. See BOARD OF SUPERVISORS.

CLAIM AND DELIVERY.

1. CLAIM AND DELIVERY OF PERSONAL PROPERTY—REPLEVIN—VALUE—JUDGMENT.—Where, in an action of replevin by the general owner of property against one who has a special interest therein, the property has been delivered to the plaintiff, the true value to be assessed and recovered by the defendant—where the suit goes in his favor—is the value of his special or limited interest in the goods recovered.—*Pico* v. *Martinez*, 148.

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CONFLICT OF EVIDENCE.

CONFLICT OF EVIDENCE—FINDINGS—FRAUD AS TO CREDITORS.—*Nathan* v. *Doane*, 348.

See ATTACHMENT, 5; EVIDENCE, 1; FINDINGS, 4; LARCENY, 2; MINING CLAIMS, 1; MISTAKE; NEW TRIAL, 1; PROMISSORY NOTE, 5; RESCISSION, 1; SPECIFIC PERFORMANCE.

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CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—SUNDAY ACT—SPECIAL LAW—DEFINITION.—The Act of April 16th, 1880, "to regulate and provide for a day of rest in certain cases," making it a misdemeanor "for any person engaged in the business of baking to engage, or permit others in his employ to engage, in the business of baking for the purpose of sale, between the hours of 6 o'clock P. M. on Saturday and 6 o'clock P. M. on Sunday, etc.," is a special law, and, as such, in conflict with subd. 2, § 25, art. iv, of the Constitution.—*Ex parte Westerfield*, 550.

See APPEARANCE, 2; SAN FRANCISCO, CHARTER OF, 1, 2, 3, 4; GRAND JURY, 2 and 3; INSOLVENCY, 2; INSTRUCTIONS, 4; JUSTICES OF THE PEACE; LARCENY, 2; MUNICIPAL CORPORATIONS, 1, 2, 3, 4, 5; SAN FRANCISCO, CHARTER OF, 1, 2, 3, 4; STATE LANDS, 3; TEXT-BOOKS, 1, 3; TRAYLOR ACT, 1, 2, 3; YOSEMITE VALLEY GRANT, 3.

CONSTRUCTION. See LEGISLATIVE GRANT; INSOLVENCY, 3.

CONSTRUCTION OF CONSTITUTION. See MUNICIPAL CORPORATIONS, 1-5.

CONSTRUCTION OF CONTRACT.

1. CONSTRUCTION OF CONTRACT.—THORNTON, J., concurring specially: P. delivered sheep to M. upon a verbal contract that he should keep them for three years for a certain proportion of the increase. Some months afterward, the contract was reduced to writing. *Held*, that the contract was a continuing one from the time M. first received the sheep, and related to that date.—*Pico* v. *Martinez*, 148.
2. CONSTRUCTION OF CONTRACT—AGENCY—DEFINITION.—The plaintiff agreed with the defendant that the latter should have the exclusive *agency* for the sale of the plaintiff's productions east of the State of California, for one year, upon an agreed commission. *Held*, there was nothing in the agreement to prevent the plaintiff from *selling* his goods in any part of the world. *Golden Gate Packing Co.* v. *Farmers' Union*, 606.
3. CONSTRUCTION OF CONTRACT—WATER COMPANY—SPRINKLING OF STREETS.—In a lease of the Los Angeles Water Works, by the defendant to the plaintiff, it was provided that the plaintiff should not dispose of water for purposes of irrigation, but should only take from the river the water necessary for domestic purposes. The defendant took water from the plaintiff's pipes for the purpose of sprinkling the streets of the city; but, while this was done, the plaintiff had on hand of the waters of Los Angeles River more than sufficient for supplying the inhabitants of the city with water for domestic purposes. In an action by the plaintiff to recover from the defendant the value of the water taken, *held*, that the plaintiff was only entitled to receive pay for water furnished to the inhabitants of the city for domestic purposes, and that it had no right to the surplus.—*Los Angeles Water Co.* v. *Los Angeles City*, 176.

See PROMISSORY NOTE, 2; VOLUNTARY PAYMENT, 2; INSOLVENCY, 3.

CONSTRUCTION OF DEED. See DESCRIPTION; EJECTMENT, 1.

CONSTRUCTION OF ORDINANCE. See HABEAS CORPUS, 3.

CONSTRUCTION OF STATUTE.

1. CONSTRUCTION OF STATUTE—"MAY"—DEFINITION.—In a proceeding for a writ of mandamus to compel the defendants to sell or fix the price of certain lots fronting on a new street opened through the Market Plaza of the City of San José, under the Act of March 4th, 1878, (Stat. 1877–8, p. 163) *held*, that the statute did not enjoin upon the defendants a duty to sell the lots in question, but simply conferred upon them the power to sell

CONSTRUCTION OF STATUTE (Continued).

or not to sell, as they should deem best for the interests of the city.—*Coopers* v. *Mayor and Common Council of the City of San José*, 599.

2. CONSTRUCTION OF STATUTE.—Where a statute is ambiguous, such a construction will be given to it as not to deprive a party of a substantial right.—*People* v. *Hodgdon*, 72.
3. CONSTRUCTION OF STATUTE—MANDAMUS—UNIVERSITY—ASYLUM FOR THE DEAF, DUMB, AND BLIND.—Under the fourth section of the Act of April 1st, 1876, (cited in the opinion) "to provide for a supply of water for the University and for the Asylum for the Deaf, Dumb, and Blind," the power to approve or disapprove of the appraisal, made under the act, is vested in the Governor, and his discretion in the matter cannot be controlled by mandamus.—*Berryman* v. *Perkins*, 483.
4. CONSTRUCTION OF STATUTE.—Where a word or clause is found repeatedly used in a statute, it will be presumed to bear the same meaning throughout, unless there is something to show that another meaning is intended.—*Id.*

See COSTS; DECLARATION OF HOMESTEAD; INSOLVENCY, 1; STATE LANDS, 2; TAX SALE.

CONSTRUCTIVE FRAUD. See CONTRACT, 5; TRUSTEE, 1, 2, 3, 4.

CONSTRUCTIVE NOTICE. See FORECLOSURE SALE, 1 and 2; NOTICE.

CONSTRUCTIVE TRUST. See FORECLOSURE SALE, 1 and 2.

CONTEMPT.

1. CONTEMPT—ENFORCEMENT OF DECREE OF DISTRIBUTION—ESTATES OF DECEASED PERSONS.—Disobedience of a decree of distribution by an executor or administrator is a contempt of court, and the decree may be enforced by proceedings under the provisions of the Code of Civil Procedure relative to contempt.—*Ex parte Cohn*, 193.
2. ID.—HABEAS CORPUS—JURISDICTION.—The functions of the writ of *habeas corpus*, when a party who has appealed to its aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the Court by which it was issued, and the validity of the process upon the face.—*Id.*
3. ID.—ID.—ID.—ENFORCEMENT OF DECREE OF DISTRIBUTION—ESTATE OF DECEASED PERSON.—*Held*, accordingly, upon an application for discharge upon a writ of *habeas corpus* by an executor who was in custody under an order of the Superior Court, adjudging him guilty of contempt in refusing to pay over money under a decree of distribution, that the Court had jurisdiction, and, the proceedings being regular and valid on their face, that the prisoner was not entitled to a discharge.—*Id.*

CONTEST. See STATE LANDS, 1, 4.

CONTEST OF WILL.

1. CONTEST OF WILL—UNDUE INFLUENCE—EVIDENCE—RES GESTÆ.—Upon the contest of a will by one of two children of the testator who had been excluded from its provisions, the contestant introduced evidence tending to show that the testator executed the will under undue influence, and a witness of proponent in reply testified that by direction of the testator he made a draft of his will, and that upon reading it to him, the testator objected to the names of the contestant and the other excluded child, and said he would not have them in, which testimony was, upon the motion of contestant, stricken out. *Held*, that the declarations of the testator, if made, constituted part of the *res gestæ*, and that the Court erred in excluding them.—*Nelson* v. *McClanahan*, 308.

CONTESTED ELECTION.

1. CONTESTED ELECTION—QUALIFICATION OF VOTER—RESIDENCE.—*Donnelly* v. *Potter*, 474.

CONTINUANCE.

1. CONTINUANCE.—The affidavit, upon a motion for a continuance on the ground of the absence of a witness, must show the materiality of the evidence, and that due diligence has been used to obtain it.—*Kern Valley Bank* v. *Chester*, 49.

CONTRACT.

1. CONTRACT—AGREEMENT—INSTRUCTIONS.—In an action upon an account, the question was whether a bill of sale of a quantity of wheat, executed by the defendant to the plaintiffs, was an absolute sale in satisfaction of the debt, or was only by way of security; and the Court instructed the jury to the effect, that the bill of sale purporting to be an absolute sale, they should find it to be such, unless it appeared from a preponderance of evidence that it was given as security, *and that both parties so understood it*. *Held*, that the last clause of the instruction was erroneous.—*Perkins* v. *Eckert*, 400.
2. CONTRACT—BOND—FINDINGS.—The defendants, (one as principal, and the other as surety) executed a bond to the plaintiff, conditioned for the performance of a building contract, by the terms of which, the principal agreed to perform the labor and furnish the materials for the construction of the building, and further agreed that no liens by mechanics, material-men, or laborers, should be filed against it; and the plaintiff agreed to pay seventy-five per cent. of the contract price during the progress of the building, upon certificates of the architect, and the balance upon its completion. In an action upon the bond, it appeared that liens were filed upon the building by material-men, and that suits were brought and judgments recovered against the plaintiff and contractor for their foreclosure; that plaintiff had paid all of the contract price but $750, which had not become due at the time of the filing of the liens, and that he paid this balance, and $594 in addition, upon the judgments; and the complaint alleged, and the answer denied, that the surety (defendant) had seasonable notice of the pendency of the foreclosure suits, and that they were properly defended by the plaintiff; but the Court failed to find upon these allegations. *Held*, that the issues were material, and should have been passed upon.—*Ernst* v. *Cummings*, 179.
3. ID.—DEPENDENT PROMISES.—*Held further*, that the promise of the contractor to protect the building from liens, and the promise of the plaintiff to pay, were mutual and dependent, and that the plaintiff was authorized to retain the $750 to meet the liens.—*Id.*
4. ID.—ID.—Where mutual promises go to the whole considerations on both sides, they are concurrent and dependent, and neither party can claim performance, without performance on his part.—*Id.*
5. CONTRACT OF CORPORATION—POWER—TRUSTEE—EVIDENCE—FIDUCIARY—CONSTRUCTIVE FRAUD.—By a unanimous vote of the trustees of the corporation defendant, it was resolved to borrow a certain sum of money, and to execute a mortgage upon the property of the corporation to secure the payment of the same—the money to be applied to the payment of the debts of the corporation—and to that end A. Wolf, president, and F., the secretary, were authorized to execute a mortgage in the name of the corporation. A. Wolf did not borrow any money, but he had purchased the debts of the corporation and assigned them to A. Wolf & Co., (of which firm he was a member) and the notes and mortgage were executed to A. Wolf & Co. to secure the said indebtedness. In an action to foreclose the mortgage brought by the assignee of the mortgagees, *held*, first, that the resolution did not authorize the execution of the notes and mortgage for any such purpose; and secondly, and apart from this consideration, the law would not permit one who acts in a fiduciary capacity thus to deal with himself in his individual

CONTRACT (Continued).

capacity; and *held*, accordingly, that the Court below did not err in excluding the notes and mortgage from the evidence.—*Davis* v. *The Rock Creek L. F. & M. Co.* 359.

6. ID.—RATIFICATION.—*Held*, upon the facts of the case, that there was no ratification of the notes and mortgage.—*Id.*

7. CONTRACT—OFFER—ACCEPTANCE—SPECIFIC PERFORMANCE—TRUST.—The Central Pacific Railroad Company issued and distributed a circular, inviting people to settle and make improvements upon its lands, and promising those that should do so, that they should be preferred as purchasers, when the lands should be offered for sale. The defendant settled upon the land in controversy, and filed his application to purchase the same, in the office of the company, as directed by the circular, and made valuable improvements thereon. The company, without notifying the defendant that the price of the lands had been fixed, and without giving him the option to purchase, sold the land to the plaintiff, who took with notice of the defendant's equities. *Held*, in an action of ejectment, wherein the defendant filed a cross-complaint, setting up the above facts, and praying that the plaintiff be compelled to convey to him—that the offer of the company, and the acceptance by the defendant, created a valid contract, and that the plaintiff took the legal title impressed with a trust in favor of the defendant, and should be compelled to convey the same to him.—*Boyd* v. *Brinckin*, 427.

8. CONTRACT—VARIANCE.—The complaint alleged that the plaintiffs entered into a contract with the S. & M. R. R. Co. (afterward merged into and consolidated with the defendant) for the construction of a tunnel—the contract price to be paid upon estimates of the chief engineer; and that the engineer, by collusion with the company, and for the purpose of defrauding the plaintiffs, omitted certain work from his estimates. Upon the trial the plaintiffs offered to prove that he did extra work, on the promise of the engineer, (subsequently ratified by the president of the company) that they should be paid for it, as for similar work under the contract. *Held*, that as the plaintiffs had not sued for extra work, but for work done under the original contract, the evidence was not admissible.—*Hinkle* v. *The San Francisco and North Pacific Railroad Company*, 627.

9. ID.—INSTRUCTIONS.—The Court in effect instructed the jury that, if the estimates of the chief engineer were honestly made, they were conclusive, but the bill of exceptions did not contain the contract, or any of the evidence to which the instruction related. *Held*, that it could not be said that there was any error in the ruling.—*Id.*

See ATTACHMENT, 1; CONSTRUCTION OF CONTRACT; CORPORATION, 2; MARRIED WOMEN, 1 and 2; NON-NEGOTIABLE; VENDOR AND VENDEE, 2.

CONTRACT FOR SALE OF LAND. See PATENT.

CONTRACTOR. See FINDINGS, 2; MECHANIC'S LIEN, 2 and 7.

CONTRIBUTION. See VOLUNTARY PAYMENT, 1 and 2.

CONTRIBUTORY NEGLIGENCE.

1. CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.—When the negligence of the injured party contributes directly to the injury complained of, the law will afford no redress; but negligence is not absolute or intrinsic, but always relates to some circumstance of time, place or persons, and whether there was contributory negligence in any given case, is generally a question for

CONTRIBUTORY NEGLIGENCE (Continued).
the jury to pass upon or determine.—*Jamison* v. *The San José & Santa Clara Railroad Company*, 593.

CONVERSION.
1. CONVERSION—BAILEE—ACTION—STATUTE OF LIMITATIONS—DEMAND.—Where possession of property is obtained, (in good faith or otherwise) from one who had no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession, and no demand or further act of conversion is necessary. Accordingly, in an action against defendants, who had, in good faith, and without notice of the plaintiff's rights, received in pledge the plaintiff's goods from her bailee, and afterward sold them, *held*, that the Statute of Limitations commenced to run from the time of the defendant acquiring possession, and not from the time of the subsequent sale by them.—*Harpending* v. *Meyer*, 555.

CONVEYANCE. See MARRIED WOMEN, 4.

CORPORATIONS.
1. CORPORATION.—In an action by a *de facto* corporation, claiming in good faith to be a corporation under the laws of this State, and doing business as such, *held*, that the question of the due incorporation of the association could not be inquired into.—*Bakersfield Town Hall Association* v. *Chester*, 98.
2. CORPORATIONS—CONTRACT—AGENT.—The common-law rule that a corporation has no capacity to act or to make a contract, except under the common seal, has been long since exploded in this country; and the authority of an agent to make a contract may be inferred from his admitted relations to the corporation, or from its course of business. *Held*, accordingly, in an action against a corporation, upon a contract made with one who was admitted to be the president and superintendent and general managing agent of the corporation, that this admission was sufficient evidence of his authority to make the contract, and that it was unnecessary to show any vote or other corporate act giving him such authority.—*Crowley* v. *The Genesee Mining Company*, 273.
See CONTRACT, 5; MECHANICS' LIEN, 4.

CORPUS DELICTI. See MURDER, 6.

COSTS.
1. COSTS—LIBEL AND SLANDER—CONSTRUCTION OF STATUTE.—Section 7 of the Act of March 23rd, 1872, "concerning actions for libel and slander," does not give a plaintiff recovering judgment any costs beyond the amount allowed by the general law as provided in the Code of Civil Procedure. *Held*, accordingly, that a plaintiff in an action of slander, who recovered less than $300, was not entitled to costs.—*Jacobi* v. *Baur*, 554.

COUNTY. See BOARD OF SUPERVISORS.

COUNTY JUDGE. See GRAND JURY, 2 and 3.

COUNTY SUPERINTENDENT. See TEXT-BOOKS.

COURTS. See HABEAS CORPUS, 1, 2, 4 and 5.

CRIMINAL LAW.
See APPEARANCE, 2; ASSAULT, 1 and 2; EVIDENCE, 2, 3, 5, and 12; BILL OF EXCEPTIONS, 2; INSTRUCTIONS, 7 and 8; LARCENY, 1, 2, 3, and 4.

CRIMINATION. See WITNESS.

CROSS-COMPLAINT.

1. CROSS-COMPLAINT—ACTION TO QUIET TITLE.—In an action to quiet title, where the defendant relies upon title in himself, a cross-complaint is unnecessary; and, if one is filed, it will not entitle the defendant to have the issues arising thereon first tried.—*Wilson* v. *Madison*, 5.

DAMAGES. See INJUNCTION, 1 and 2.

DECLARATION. See EVIDENCE, 5 and 8; LARCENY, 4; TRUSTEE, 3.

DECLARATION OF HOMESTEAD.

1. DECLARATION OF HOMESTEAD—CONSTRUCTION OF STATUTE.—Under § 1263 Civil Code, a declaration *must* contain an estimate of the actual cash value. So *held*, with reference to a declaration of homestead that stated that the actual cash value was $5,000 and over.—*Ames* v. *Eldred*, 136.

DECREE OF DISTRIBUTION, ENFORCEMENT OF. See CONTEMPT, 3.

DEED. See ACTION TO QUIET TITLE, 3; ATTACHMENT, 3; DESCRIPTION IN CONSTRUCTION OF.

DEED INTENDED AS A MORTGAGE. See MORTGAGE, 3, 4, 5.

DEED OF TRUST. See RECEIVER.

DEFAULT.

1. DEFAULT—DISCRETION OF COURT.—*Held*, upon the facts of the case, that there was no abuse of discretion, on the part of the Court below, in setting aside a default.—*Davis* v. *The Rock Creek L. F. & M. Co.* 359.
2. SETTING ASIDE DEFAULT—DISCRETION OF COURT.—*Freeman* v. *Brown*, 465. See FICTITIOUS NAME.

DEFENSE. See GIFT; ASSAULT, 1 and 2.

DEFINITION. See AGENCY; ALLOWED; AMENDMENT; APPEAL, 6; BUILDING; CLAIM; CLASSIFICATION; CONTRACT; DEED INTENDED AS A MORTGAGE; DISTRICT SCHOOL TAX; EVICTION; FACTOR, 1, 2, and 3; FRIVOLOUS ANSWER; GENERAL LAWS; INSTRUMENT; JUDICIAL OFFICERS; LARCENY, 1 and 2; LOCAL; LOCAL BOARDS; LYING IN WAIT; MANAGEMENT OF COMMON SCHOOLS; MARKET VALUE OF STOCK; MAP; MORTGAGE, 3; ORIGINAL CONTRACTOR; PARTY AGGRIEVED; PAYABLE IN THIS STATE; PRINCIPAL AND SURETY; PROVIDED; PUBLIC PLACE; QUESTION OF LAW; STRUCTURE; TIMBER.

DELIVERY.

1. DELIVERY—CHATTEL MORTGAGE—LOSS OF MORTGAGED PROPERTY—INSTRUCTION.—By the terms of a chattel mortgage of wheat, the mortgagor was to harvest the same, and to deliver it into possession of the mortgagees; and, the question being as to who should bear the loss of a portion of the wheat, alleged to have been shipped by railroad to the place of destination agreed upon, but which did not arrive, the Court instructed the jury to the effect, that if the wheat referred to was shipped in the name of the plaintiffs, and the bills of sale taken in their name with their knowledge and consent, then they were in the possession and the owners thereof, and were liable for any loss resulting from their own negligence or carelessness, or that of their

DELIVERY (Continued).

agents and employés. *Held*, that the proposition was not law, and that the instruction was erroneous.—*Perkins* v. *Eckert*, 400.

See ACTIONS FOR PERSONAL PROPERTY, 3; MECHANICS' LIEN, 2; MORTGAGE.

DEMAND. See CONVERSION.

DEMURRER. See FRAUD AS TO CREDITORS, 1.

DENIAL. See DIVORCE, 3.

DEPENDENT PROMISES. See CONTRACT, 3 and 4.

DEPUTY. See STATE LANDS, 6 and 7.

DESCRIPTION OF DEED.

1. DESCRIPTION IN DEED—BOUNDARY—QUANTITY—CONSTRUCTION.—A call in a deed for metes and bounds, if clear, will prevail over a call for quantity; but, where the boundaries are doubtful, quantity often becomes a controlling consideration.—*Winans* v. *Cheney*, 567.

See ASSESSMENT, 1.

DESERTION. See DIVORCE, 5.

DISBARRING OF ATTORNEY.

1. DISBARRING OF ATTORNEY—UNPROFESSIONAL CONDUCT.—*The People ex rel. Burridge* v. *Pearson*, 472.

DISCRETION OF COURT. See DEFAULT, 1, 2; NEW TRIAL, 2.

DISHONOR. See NEGOTIABLE INSTRUMENT.

DISMISSAL OF ACTION.

1. DISMISSAL OF ACTION—STIPULATION—MAXIM.—In an action of ejectment, (prior to the adoption of the Codes) a stipulation was filed, and an entry thereof made in the register, dismissing the action as to certain defendants and as to part of the land, but no judgment was entered thereon by the clerk. *Held*, that if it was necessary for a formal judgment to be entered, the law would consider that as done which ought to have been done.—*McLeran* v. *McNamara*, 508.
2. ID.—ID.—ID.—STAY OF EXECUTION—JURISDICTION.—A plaintiff, who obtains judgment in violation of his written stipulation on file dismissing the action, may be restrained by the court in which judgment was obtained, from enforcing it.—*Id.*
3. ID.—ID.—The attorney for the plaintiff has power to dismiss the action by virtue of his general authority, and a stipulation to that effect does not depend for its efficiency upon a special consent or authority given him by the plaintiff.—*Id.*

DISMISSAL OF APPEAL. See APPEAL, 6.

DISTRICT SCHOOL TAX.

1. DISTRICT SCHOOL TAX—ASSESSMENT ROLL—EVIDENCE.—Though the assessment roll may be *prima facie* evidence of its contents, it is not conclusive in a proceeding directly based upon its correctness. *Held*, accordingly, in an action to recover a district school tax, that it was error to exclude evidence offered by defendant to show that the assessment roll was simply copied

DISTRICT SCHOOL TAX (Continued).

from the assessment roll of the county, and that no assessment was in fact made.—*The People* v. *Lansing*, 393.

2. ID.—NOTICE—PUBLIC PLACES—DEFINITION.—Notices of election were posted at a store and two saloons, occupying three of the corners formed by two roads crossing each other, and within a circumference of eighty feet; and the Court found that the notices were posted in three of the most public places in the district. *Held*, that the finding was justified by the evidence. *Id.*

DIVORCE.

1. DIVORCE—FRAUDULENT JUDGMENT—APPEARANCE—ESTOPPEL—COMMON PROPERTY.—In an action of ejectment, in which both parties deraigned title under a deed executed May 15th, 1865, for valuable consideration, to one Amanda C., the defendant by a deed direct from her, and the plaintiff by a deed from J. C.—formerly her husband—the case turned upon the validity of a judgment of divorce rendered June 23rd, 1864, in a case brought by J. C. against Amanda C., in the State of Indiana, in which the latter appeared by attorney; but it appeared that the appearance of the attorney was without her knowledge or consent. *Held*, that the judgment was not void, but, at most, only voidable at her instance, and that it could not be attacked by her husband or his grantee.—*Elliott* v. *Wohlfrom*, 384.
2. ID.—FRAUD.—Fraud renders any transaction void at the election of the party defrauded; but the party by whom the fraud is perpetrated has not that election.—*Id.*
3. DIVORCE—PLEADING—ANSWER—DENIAL—HOMESTEAD.—In an action for divorce by a wife against her husband, the complaint alleged that certain land (the separate property of the latter) was dedicated as a homestead by a declaration filed and recorded by her, and that at the time of the declaration, the parties were residing on the land; and the answer denied the former but not the latter allegation. *Held*, that the denial of the ultimate fact was sufficient, and that a finding, that the wife, at the time of the declaration, had abandoned her husband, and was not residing on the land, was within the issue.—*Lowell* v. *Lowell*, 316.
4. ID.—SEPARATE PROPERTY—HUSBAND AND WIFE.—*Held further*, that the decree rightly adjudged the land to the defendant.—*Id.*
5. ID.—DESERTION—FORMER ADJUDICATION—ESTOPPEL.—A judgment, pleaded as an estoppel in this case, *held* not to be so.—*Id.*
6. ID.—ATTORNEY'S FEE.—The defendant filed a cross-complaint, alleging abandonment by the plaintiff, and judgment was rendered in his favor; but the judgment directed that he should pay money to the plaintiff for her attorney's fee. *Held*, not to be erroneous.—*Id.*

DRAWING OF GRAND JURY. See GRAND JURY.

DRUNKENNESS AS JUSTIFICATION. See ASSAULT, 1, 2.

EJECTMENT.

1. EJECTMENT—CONSTRUCTION OF DEED.—G. being the owner of the Bosquejo or Lassen Rancho, agreed to convey to F. and W. 5,000 acres of land from the lower end of the rancho—500 acres to F. and 4,500 to W.—and in pursuance of the agreement, on the same day executed deeds to F. and W.; but, as to which was delivered first, the evidence was conflicting. The land conveyed to W. was described as "being 4,500 acres of land, taken off of the lower or most southerly portion of the rancho, * * * extending the full width of said rancho, from the westerly to the easterly boundaries thereof, and

EJECTMENT (Continued).

as far above the southerly line as shall be necessary to include * * * 4,500 acres of land, provided that no part of the land hereby conveyed * * * shall be or extend north of a straight line drawn from a point on the Sacramento, at a distance of one Spanish league south of the mouth of Deer Creek, due east to the easterly boundary line of said rancho; and if there should not be 4,500 acres of land between the said line and the southerly line of said rancho, the balance or residue of said land, to make up the said 4,500 acres, shall be taken off from the south-easterly corner of said rancho, in a square form." The land conveyed to F. was described as "being 500 acres of the rancho; * * * it being expressly understood that the said 500 acres shall be taken off of the south-westerly corner of said rancho, in a rectangular form, the frontage along the Sacramento River to be *not more than one-half the depth;* provided that no part of the land conveyed shall be or extend north of a straight line," etc.—(being the same as described in the first deed). In an action of ejectment brought by grantees of F. against subsequent grantees of G., *held*, that the deeds, being executed at the same time, were to be regarded as parts of one and the same transaction; and that, reading the deeds together, it must have been understood and agreed that the W. deed should be first located; and that the 500 acres conveyed to F. were to be located on the south-westerly corner of the rancho, *after* the location of the Wilson tract.—*Pulliam v. Bennett*, 368.

2. ID.—STATUTE OF LIMITATIONS—ADVERSE POSSESSION.—*Held, further*, upon the evidence, that the possession of the land by G., after his conveyance to F., was not adverse.—*Id.*

See GIFT; MORTGAGE, 5.

EJECTMENT OF PASSENGER. See RAILROAD.

ELECTION. See JUSTICE OF THE PEACE; SAN FRANCISCO, CHARTER OF, 2, 3, 4.

ELECTION COMMISSIONERS.

1. BOARD OF ELECTION COMMISSIONERS—REGISTRAR OF VOTERS—APPOINTMENT OF OFFICERS.—Under the Act of March 18th, 1878, "to regulate the registration of voters, etc., in the City and County of San Francisco," the Board of Election Commissioners has power to fix the number of clerical assistants to be employed by the Registrar; but the power of selecting and employing such assistants is vested in the Registrar.—*Schmitt v. Dunn*, 651.
2. ID.—ID.—ID.—ALLOWED—PROVIDED.—The meaning of these terms construed.—*Id.*

See SAN FRANCISCO, CHARTER OF, 2, 4.

ENGROSSMENT. See STATEMENT ON MOTION FOR NEW TRIAL.

ENROLLMENTS. See STATUTE OF.

ENTRY OF JUDGMENT. See APPEAL, 1.

EQUITABLE ASSIGNMENT. See MORTGAGE, 2.

EQUITABLE DEFENSE. See GIFT.

EQUITABLE REDEMPTION. See REDEMPTION, 4.

EQUITABLE TITLE. See STATUTE OF LIMITATIONS, 2.

EQUITY. See ACTIONS, 2, 3; FRAUD AS TO CREDITORS, 1, 2, 3.

ERROR. See OFFICE, 2.

ESCAPE. See APPEARANCE, 2.

ESTATES OF DECEASED PERSONS.

1. ESTATES OF DECEASED PERSONS—FINDINGS.—Whenever issues of fact are tried by the Probate Court, findings of fact are proper.—*Estate of Crosby*, 574.
2. ID.—CLAIMS.—E. P. R., administrator of an estate, presented to the Probate Judge, for allowance, a claim against the estate, based, in part, upon a promissory note executed to him by the deceased, and, in part, upon a judgment against the deceased in favor of one E. R., of which E. P. R. was the equitable owner, but of which no assignment had been made to him, and the claim was allowed by the Judge. Upon a subsequent application for the sale of real estate, it was objected to the claim, that the judgment had never been assigned to E. P. R., and that the claim was not accompanied by a certified or other copy of the judgment. *Held*, that the claim was properly presented in the name of E. P. R., and that under the law as it stood, at the time it was presented, it was not necessary that it should be accompanied by a copy of the judgment.—*Id.*
3. ID.—SALE OF REAL ESTATE—LAPSE OF TIME—LACHES.—Courts of Probate have the power, and it is their duty, to refuse an order for the sale of real estate, where there has been such delay in making the application as to amount to laches. So *held*, (upon the facts stated in the opinion) in a case where seventeen years had elapsed from the date of the allowance of claims before the application was made.—*Id.*
4. ID.—ID.—ID.—STATUTE OF LIMITATIONS.—A proceeding in the Probate Court for the sale of real estate is perhaps "a special proceeding of a civil nature," and, as such, subject to the limitation prescribed by § 363, Code of Civil Procedure; but *held*, unnecessary to decide the question.—*Id.*
5. ESTATES OF DECEASED PERSONS—ADMINISTRATOR—ACCOUNT.—The appellant was appointed administrator of the deceased, but the order was afterward reversed on appeal. *Held*, that he was not entitled, upon accounting, to an allowance for attorney's fees and costs expended by him in the contest.—*Estate of Barton*, 87.
6. ID.—ID.—ID.—Upon a contest for the administration, the estate certainly should not bear the expense of the losing party; and the question stated but not decided, whether it should bear the expense of the winning party.—*Id.*
7. ID.—ID.—ID.—COMMISSIONS.—There is but one aggregate sum to be allowed as commissions for administration; and in case of a change of administration, the Court has no basis upon which to make an apportionment between the administrators, until the close of the estate. The outgoing administrator is therefore entitled upon the settlement of his account only, to commissions for the portion of the estate fully administered by him, and for his proportion of the balance of the commission must wait until the final settlement of the estate.—*Id.*
8. ESTATES OF DECEASED PERSONS—SALE OF REAL ESTATE—PETITION—JURISDICTION.—A petition for the sale of real estate, whether under § 1530, or under § 1537, Code of Civil Procedure, must, in order to give the Court jurisdiction, set forth the *condition* of the property, and, if under the latter section, it must be verified.—*Estate of Boland*, 310.
9. ID.—ID.—ID.—ID.—Proceedings for the sale of real estate, in the Probate Court, are in the nature of an action, and the jurisdiction of the Probate Court depends absolutely on the sufficiency of the petition—in other words,

ESTATES OF DECEASED PERSONS (Continued).

upon its substantial compliance with the requirements of the Probate Law. *Id.*

See APPEAL, 2, 5; CONTEMPT, 1, 3; CONTEST OF WILL.

ESTOPPEL.

1. ESTOPPEL—FORMER JUDGMENT—LANDLORD AND TENANT.—If a landlord defends for and in the name of his tenant, and puts his title in issue in aid of the tenant's right of possession, a judgment against the tenant is a bar to a subsequent action by the landlord against the party recovering the judgment. But it must appear that the subject-matter or question was not only the same, but that it was submitted on the merits, and actually passed upon by the Court.—*Altschul* v. *Polack*, 633.
2. ID.—ID.—ID.—Accordingly, in an action of ejectment, where there was a plea of a former judgment in favor of defendant against plaintiff's tenant, and it appeared that the plaintiff was originally a party defendant, and conducted the defense, but that on the close of the testimony, on motion of the former plaintiff, the suit was dismissed as to him, and his deraignment of title stricken out, and that the Court refused to permit the defendants to show that they were his tenants, and to justify under his title: *Held*, that there was no estoppel, and that it made no difference that the rulings of the Court were erroneous, and that an appeal might have been taken.—*Id.*
3. ID.—ID.—ID.—STATUTE OF LIMITATIONS—ADVERSE POSSESSION.—In an action to establish an involuntary trust as to real estate against Mary P., and to compel a conveyance of the legal title, it appeared that the cause of action accrued more than eight years before the commencement of the action, but that the plaintiff was at that time in the possession of the land by his tenant, and remained so until about December, 1867, at which time the defendant entered upon the land by collusion with the tenant, and thenceforth claimed to hold adversely. *Held*, upon a plea of the Statute of Limitations, that the plaintiff was not barred.—*Id.*

See CLAIMS AGAINST A CITY, 3; DIVORCE, 1, 5; FORMER ADJUDICATION; GUARDIANS, 2; STATE LANDS, 7.

EVICTION.

1. EVICTION—DEFINITION—PENDENCY OF ACTION—JUDGMENT.—The defendant leased land to the plaintiff upon which there was a stream of water; and the next day, in an action commenced prior to the lease by the San José Water Company—in which, however, no notice of *lis pendens* had been filed—consented to a decree for the condemnation of the water, and the water company afterward appropriated the water of the stream. In an action for damages for the loss of the water, *held*, that, as the defendant's lease antedated the decree, and he had no notice, actual or constructive, of the pendency of the action, he was not affected by it; and that, as the defendant had not participated in the diversion of the water, or done anything beyond consenting to the entry of a decree against himself, which could not in any way affect the rights of the plaintiff, there was no eviction.—*Sullivan* v. *Beardsley*, 608.
2. ID.—ID.—ID.—To constitute a partial eviction, in such a case as the one stated, it would be necessary for the plaintiff to show that the water company had established a right to divert the water by a title *prior* to that of the plaintiff, or that the defendant had at least had some agency in diverting it.—*Id.*

EVIDENCE.

1. EVIDENCE—ACCOUNT BOOKS—ALTERATIONS—FINDINGS—CONFLICT OF EVIDENCE.—In an action for a settlement of partnership accounts, a statement of accounts between the partners, made by an expert in book-keeping, was offered in evidence by the plaintiff, and it appeared by the testimony of the witness, that the books had been altered by him by the direction of the plaintiff after the dissolution. *Held*, that if this had been the only evidence of the correctness of the statement, it would have been inadmissible in evidence; for the plaintiff had no right to alter the books, and then use them as evidence in support of his case; but *held, further*—there being sufficient evidence *aliunde* to show the correctness of the data from which the statement was made—that it was properly admitted: and *held, further*—the evidence being conflicting on the point—that the findings would not be disturbed.—*Butler* v. *Beech*, 28.
2. EVIDENCE—CRIMINAL LAW.—The testimony of a witness taken down by the Justice of the Peace, upon the preliminary examination of the defendant in the indictment, is inadmissible on the trial of the indictment, except in the cases specified in § 686 of the Penal Code.—*People* v. *Bojorquez*, 463.
3. ID.—ID.—OBJECTION TO TESTIMONY.—*Held*, accordingly, that such testimony was inadmissible where it appeared that the witness was within reach of the subpœna of the Court, but too unwell to appear: and *held, further*, that an objection to the testimony, that it was *incompetent*, was sufficient.—*Id.*
4. EVIDENCE.—Certain evidence referred to in the opinion held to have been erroneously excluded.—*Tracy* v. *Craig*, 91.
5. EVIDENCE—CRIMINAL LAW—DYING DECLARATION.—It is essential to the admissibility of a dying declaration, that it appear that it was made under a sense of impending death; and where it appears that the deceased had any expectation or hope of recovery, however slight it may have been, and though death actually ensued within an hour afterward, the declaration is not admissible.—*People* v. *Hodgdon*, 72.
6. EVIDENCE—INCREASE OF CATTLE.—Certain testimony held to be admissible.—*Witherby* v. *Thomas*, 9.
7. EVIDENCE—PARTY IN INTEREST—PROOF OF RECORD—EXCLUSION OF WITNESSES.—A party in interest, though not a party of record, should be allowed to be present at the trial, and should therefore be excepted from an order excluding witnesses from the court-room during the trial.—*Chester* v. *Bower*, 46.
8. ID.—DECLARATIONS—OBJECTIONS TO EVIDENCE.—It is not error for the Court to refuse to strike out evidence, some of which is admissible. The motion should be directed exclusively to the objectionable testimony.—*Id.*
9. ID.—MATERIALITY OF EVIDENCE.—Certain evidence, stated in the opinion, held to have been rightly excluded, as immaterial.—*Id.*
10. EVIDENCE—REPUTATION—NEGLIGENCE.—The issue being, was E. powder a reasonably safe powder, and did the defendant exercise due care in ascertaining its safety? a witness was asked—the defendant objecting—"What was the reputation of E. powder as a safe or dangerous compound?" *Held*, error; it not appearing that the reputation asked for ever came to the knowledge of defendant, or that it existed at any place where defendant was bound to inquire.—*Sowden* v. *Idaho Quartz Mining Co.*, 443.
11. ID.—EXPERT—WITNESS.—A practical miner who has used blasting powder for years, and used a large amount of a certain powder, can be asked his opinion, based upon his experience, as to the safety of that powder, by virtue of the provisions of subdivision 9, § 1870, of the Code of Civil Procedure.—*Id.*

EVIDENCE (Continued).

12. EVIDENCE—THREATS—CRIMINAL LAW—MURDER.—Upon the trial of an indictment for murder, it appeared that an affray had taken place, shortly before the killing, between the deceased and the defendant, in which the latter had been badly cut, but from the evidence there was a question whether deceased was not fired upon before he commenced to use his knife; and the Court excluded evidence of threats previously made by the deceased, that he intended to kill the defendant, on the ground that it did not appear that the threats were communicated to the defendant. *Held*, that upon the determination of the question, *by whom was the affray commenced?* may have depended the verdict of murder, instead of manslaughter, and that upon this question the evidence was admissible, as tending to show that the deceased attempted to fulfill his threat.—*People* v. *Alivtre*, 263.

13. EVIDENCE—PAROLE TESTIMONY TO EXPLAIN RES GESTÆ—LATENT AMBIGUITY—MAP.—In an action of ejectment to recover land, alleged to have been selected as a school lot by the commissioners appointed under certain ordinances of the Common Council of San Francisco, and the Act of March 11th, 1858, ratifying the same, the plaintiff put in evidence the report of the commissioners to the Common Council, and the map accompanying the same, and offered to prove that, before the map and report were filed, the lots selected by the commissioners, and referred to in their report, were colored by them on the map; that such coloring was intended to designate them as school lots; and that the lot in question was one of the lots so colored, and intended to be designated as school lots. To this offer the Court sustained an objection, and refused to permit the witnesses to testify. *Held*, first, that the plaintiff was entitled to prove by witnesses the condition of the map when it was filed, and that this was substantially included in the offer to prove that the lots, referred to in the report of the commissioners, were colored by them before the map and report were furnished to the Common Council; secondly, that parole testimony was also admissible to show that the coloring of the map was done by the commissioners, and the purpose for which it was done: the grounds of the decision being, that the purpose of the act was part of the *res gestæ*, and could therefore be proven by parole testimony; and also, that, it appearing that the purpose of the coloring was to designate the lots as selected for public purposes, there arose a *latent* ambiguity, as to which color was intended to designate the lots selected for school purposes, to remove which, evidence was admissible. —*The Board of Education* v. *Keenan*, 642.

14. ID.—OBJECTIONS—OFFER OF EVIDENCE.—When an offer is made of a mass of evidence, complex in its character, and the whole of it is objected to, in such case, if any part of it is admissible, it is error to exclude the whole.—*Id.*

15. ID.—ID.—ID.—CASES DISSENTED FROM AND EXPLAINED.—*Hosley* v. *Black*, 28 N.Y. 444; *Gardner* v. *Barden*, 34 id. 438; *Beebe* v. *Bull*, 12 Wend. 504; *Wharton* v. *Douglass*, 76 Pa. St. 273, to the contrary effect, dissented from; and *Coveny* v. *Hale*, 49 Cal. 552, explained, as approving the rule laid down in this case. *Id.*

See ACTIONS FOR PERSONAL PROPERTY, 1, 4; ATTORNEY'S FEE, 2; CONFLICT OF EVIDENCE; CONTRACT, 5; CONTEST OF WILL; DISTRICT SCHOOL TAX; IMPEACHMENT OF WITNESS; INSTRUCTIONS, 4; LARCENY, 3, 4; MURDER, 4, 5; OFFICE, 2; PLEADING, 2; PROMISSORY NOTE, 4; RESCISSION, 3; TRUSTEE, 3; UNLAWFUL ENTRY, 3.

EXCEPTIONS. See BILL OF INSTRUCTIONS, 3.

EXCLUSION OF WITNESSES. See EVIDENCE, 7.

EXECUTION. See INJUNCTION, 4; RETURN ON; STAY OF.

EXECUTION SALE. See INJUNCTION, 3; SHERIFF'S DEED, 3.

EXECUTOR. See MORTGAGE, 1; GUARDIAN AND WARD, 4.

EXHIBIT. See ATTORNEY'S FEE.

EXPERT. See EVIDENCE, 11.

EX-SHERIFF. See INJUNCTION, 4.

FACT. See QUESTION OF FACT.

FACTOR.

1. FACTOR—DEFINITION—AGENT—FREIGHT—MARITIME LIEN.—The plaintiff forwarded wheat to M.'s Sons, commission merchants, to be shipped to Europe, and sold by them for his account; and M.'s sons shipped the wheat in their own name on a vessel chartered by them, of which the defendant was master—the defendant having no notice of the plaintiff's ownership. After the wheat was placed on board, and the vessel had received about half her cargo, M.'s Sons became insolvent, and broke the terms of the charter-party by refusing to proceed with the loading; and thereupon, after demand and refusal to deliver, the plaintiff brought his action, and replevied the wheat. *Held*, that M.'s Sons had authority to deal with the wheat as their own in any contracts within the scope of their agency, and that the plaintiff was bound by their action.—*Hayes* v. *Campbell*, 421.
2. ID.—ID—ID.—ID.—MARITIME LIEN.—*Held, further*, that the defendant was entitled to a lien on the wheat for the payment of the freight and charges on the completion of the voyage.—*Id.*
3. ID.—ID.—ID.—ID.—ID.—CHARTER PARTY.—CONSTRUCTION.—*Held, further*, that the fact, that M.'s Sons had chartered the ship for the voyage, did not operate to deprive the owner of the benefit of the lien upon the cargo; that such a contract is a letting of the carrying capacity of the vessel, and not of the vessel itself, and is considered in law a contract of affreightment.—*Id.*

FAILURE OF TITLE. See VENDOR AND VENDEE, 1.

FEE. See ATTORNEY'S FEE.

FEDERAL COURT. See REMOVAL OF CAUSE TO.

FICTITIOUS NAME.

1. FICTITIOUS NAME—SERVICE OF AMENDED COMPLAINT—JUDGMENT BY DEFAULT—PRACTICE.—Where a complaint is amended (under § 474 of the Code of Civil Procedure) by inserting the true name of a defendant, sued by a fictitious name, service of a copy of the amended complaint on such defendant is not required, nor is he entitled to ten days in which to answer. Section 472 of the Code of Civil Procedure has no application to such a case.—*Brock* v. *Martinovich*, 516.

FIDUCIARY. See CONTRACT, 5; TRUSTEE, 1, 2, 3, 4.

FINDINGS.

1. FINDINGS.—Where the findings are contradictory upon a material point, the judgment cannot be sustained. So *held*, where both the complaint and answer alleged possession in the defendant, and the Court found that all the

FINDINGS (Continued).

allegations of the latter were true, and all the allegations of the former were untrue.—*Manly* v. *Howlett*, 94.

2. FINDINGS.—For a finding to be sufficient, either the ultimate fact must be found, or facts from which the ultimate fact is necessarily deducible.—*Downing* v. *Graves*, 544.
3. FINDINGS,—The findings in the case discussed, and held not to be open to the objection that the findings of fact and conclusions of law are not separately stated.—*Butler* v. *Beech*, 28.
4. FINDINGS—CONFLICT OF EVIDENCE.—The findings sustained in this case, on the ground that there was a conflict in the evidence.—*Wakefield* v. *Bouton*, 109.
5. ID.—NEW TRIAL—PRACTICE.—The findings of the jury in an equity case are not binding on the Court, but may be set aside or disregarded by the Court without a motion for new trial.—*Id.*
6. INSUFFICIENT FINDING.—The Court, after finding other facts, found that "the foregoing are all the facts of the case, and all and singular the allegations of the * * answer are untrue, *except only in so far as the same accord with the foregoing facts.*" *Held*, insufficient.—*Harlan* v. *Ely*, 340.

See CONFLICT OF EVIDENCE; CONTRACT, 2; ESTATE OF DECEASED PERSONS, 1; EVIDENCE, 1; FORECLOSURE OF MORTGAGE; MISTAKE; MORTGAGE, 2; PARTNERSHIP NOTE; PLEADINGS, 4; PRACTICE, 1; PROMISSORY NOTE, 5; SPECIFIC PERFORMANCE; TRUSTEE, 4.

FORECLOSURE OF MORTGAGE.

1. FORECLOSURE OF MORTGAGE—ATTORNEY'S FEES—PENALTY—FINDINGS.—In an action to foreclose a mortgage which provided for an attorney's fee, the answer alleges that the plaintiff's attorney received a regular salary in compensation for all his services, and that the plaintiff had not agreed or become liable to pay him any compensation for his services in the action; but the Court failed to find upon the issue, and allowed the attorney's fee provided for in the mortgage. *Held*, that the judgment should be reversed for want of sufficient findings; that the plaintiff was not entitled to an allowance for attorney's fees, except for such sum as it had paid or become liable to pay to its attorney.—*Bank of Woodland* v. *Treadwell*, 379.

FORECLOSURE SALE.

1. FORECLOSURE SALE—PRINCIPAL AND SURETY—CONSTRUCTIVE TRUST—CONSTRUCTIVE NOTICE.—The plaintiff, to secure the note of her husband, (given for his own indebtedness) executed, jointly with him, a mortgage upon land previously conveyed to her by him, by deed of gift duly recorded; and, upon the foreclosure of the mortgage, the land was purchased by one B., for the husband, and with his money, and was by B. conveyed to him. Afterward, the husband, to secure an antecedent indebtedness, conveyed to the defendant, who took without actual notice of the premises. *Held*, 1st, that the husband, in purchasing the property through B. at the foreclosure sale, was but paying his own debt, and, therefore, took the title in trust for the plaintiff; and 2nd, that the records were sufficient to put the defendant upon inquiry, and he was bound at his peril to inform himself as to the facts; and that he therefore took, subject to the trust.—*Hassey* v. *Wilke*, 525.
2. ID.—ID.—ID.—ID.—MCKEE, J., dissenting, was of the opinion that the defendant took without actual or constructive notice that B. held the title in secret trust for the husband, or that the latter held it for his wife.—*Id.*

FORMER ADJUDICATION.

1. FORMER JUDGMENT—ESTOPPEL.—A judgment for defendants, in an action for the trespassing of defendants' cattle on the plaintiff's land, held not to

FORMER ADJUDICATION (Continued).

be a bar to a subsequent action for similar trespasses, occurring prior to those alleged in the former action.—*De la Guerra* v. *Newhall*, 21.

See DIVORCE, 5; ESTOPPEL, 1, 2, and 3.

FORMER JUDGMENT. See FORMER ADJUDICATION.

FRAUD. See ACTIONS FOR PERSONAL PROPERTY, 3, 4; CONSTRUCTIVE FRAUD; FRAUD AS TO CREDITORS; FRAUDULENT CONVEYANCES; PLEADING, 1; PROMISSORY NOTE, 5; RESCISSION, 1.

FRAUDULENT CONVEYANCE. See FRAUD AS TO CREDITORS, 1, 2, and 3.

FRAUD AS TO CREDITORS.

1. FRAUD AS TO CREDITORS—FRAUDULENT CONVEYANCE—EQUITY—PLEADING—DEMURRER—ACTION TO QUIET TITLE—EQUITY.—In an action by a purchaser at an execution sale, to quiet title and to compel a conveyance against one who had purchased land from a fraudulent grantee of the execution debtor, by a deed made with intent to defraud creditors, the complaint alleged that the defendant claimed some estate or interest in the land adverse to the plaintiff, but that his claim was without right, and that he had no right, title, or interest therein; and the answer admitted the former and denied the latter allegation; and the Court found that the defendant had purchased *with constructive* but *without actual* notice of the fraud, and that he had paid off a mortgage on the land which was prior to the plaintiff's claim. *Held*, 1st, that the pleadings raised a material issue, and that, though the answer should have set out the nature of the defendant's claim, yet, as no demurrer or objection to the evidence was interposed, it could not be objected that the finding was not within the issue; and 2ndly, that the plaintiff was entitled to the relief prayed for, only upon the terms of paying to the defendant the amount paid by him in satisfaction of the mortgage.—*Tompkins* v. *Sprout*, 31.
2. ID.—ID.—ID.—In an action to set aside a deed which is only constructively fraudulent, a Court of Equity will protect the purchaser as well as the creditor, where both can be protected without injury to either.—*Id.*
3. ID.—ID.—ID.—Where the fact of fraud is established in a suit at law, the buyer loses the property; but where the proceeding is in equity, the Court will deal with the subject according to the equities of the case; the cardinal principle, in all such cases, being that the property of the debtor shall not be diverted from the payment of his debts, to the injury of the creditor, by means of the fraud.—*Id.*

See CONFLICT OF EVIDENCE; INSTRUCTIONS, 3.

FREEHOLDERS. See SAN FRANCISCO, CHARTER OF, 2, 4.

FREIGHT. See FACTOR, 1, 2, and 3.

FRIVOLOUS ANSWER. See PRACTICE, 2.

GENERAL LAW. See MUNICIPAL CORPORATION, 4, 5.

GENERAL RELIEF. See VENDOR AND VENDEE, 1.

GIFT.

1. GIFT—PART PERFORMANCE—SPECIFIC PERFORMANCE—PLEADING—EJECTMENT—EQUITABLE DEFENSE.—A parole gift of land, followed by possession and improvement of the land by the donee, is so far executed as to entitle

GIFT (Continued).

the donee to a specific performance; but *held*, in an action of ejectment, by the grantee of the donor, that the defense must be specially pleaded.—*Manly* v. *Howlett*, 94.

See STATUTE OF LIMITATIONS, 2.

GOOD FAITH. See PURCHASER.

GRAND JURY.

1. DRAWING OF GRAND JURY—NOTICE.—If the officers required by § 215 of the Code of Civil Procedure, to be present at the drawing of the grand jury, are actually present, it is immaterial whether any notice is given to them by the clerk.—*People* v. *Gallagher*, 462.
2. ID.—CONSTITUTIONAL LAW—COUNTY JUDGE—SUPERIOR JUDGE.—It would seem that it was intended by the new Constitution (Schedule, § 3) that the Superior Judge should succeed to the duty of the County Judge in respect to the drawing of jurors.—*Id.*
3. ID.—ID.—ID.—PARTIAL REPEAL OF STATUTE.—Section 215 of the Code of Civil Procedure is not inconsistent with the Constitution, except in the provision requiring the presence of the County Judge; and, with this exception, it continues in operation by virtue of § 1 of the Schedule.—*Id.*

GUARDIAN AND WARD.

1. GUARDIAN AND WARD—INVESTMENT.—A guardian may invest moneys of his ward without an order of Court; but, if he do, it may generally be said that he does it at his own risk. An order for investment obtained from the Probate Court, under § 1792 of the Code of Civil Procedure, would protect him even if misfortune were to follow; but, where he acts upon his own judgment, he is held to a more strict accountability.—*Guardianship of Cardwell*, 137.
2. ID.—ACCOUNTING—ESTOPPEL.—The settlement of a guardian's annual account is only *prima facie* evidence of its correctness. Section 1738 of the Code of Civil Procedure, as to the conclusiveness of administrators' accounts, is not made applicable to guardian's accounts by § 1789 of the Code of Civil Procedure.—*Id.*
3. ID.—INTEREST.—Where a guardian acts in good faith, and does not make any use or profit for himself of the funds, he is chargeable with the statutory rate of interest only.—*Id.*
4. GUARDIAN—EXECUTOR—WILL.—A testamentary executor or guardian cannot act as such until he qualifies, and letters are issued to him: until then his acts are void.—*Aldrich* v. *Willis*, 81.
5. ID.—ADMINISTRATOR DE SON TORT—INFANT.—One wrongfully intermeddling with the property of an infant is sometimes held by equity as a guardian, (as in the case of an administrator *de son tort*) for the purpose of an accounting; but he acquires none of the rights.—*Id.*
6. GUARDIAN—TRUST FUND—TRUSTEE—PROMISSORY NOTE—ACTION FOR PERSONAL PROPERTY.—A promissory note was made to G. "or order, for the benefit" of certain minors, and was by him indorsed and delivered to the plaintiff, (the mother of the minors) and by her indorsed and delivered to the defendant, as a pledge to secure a debt of her own. Afterward the plaintiff was appointed guardian of the minors, and brought this action to recover the note or its value. *Held*, that the plaintiff, as guardian of the beneficiaries, was entitled to the possession of the note, and could maintain the action.—*Carrillo, Guardian, etc.*, v. *McPhillips*, 130.

See MORTGAGE.

HOMESTEAD. See DIVORCE, 3.

HUSBAND AND WIFE. See DIVORCE, 4.

HABEAS CORPUS.

1. HABEAS CORPUS—POLICE COURT OF SAN FRANCISCO—INFERIOR COURT—JURISDICTION—CASE CRITICISED.—The Police Court of the City and County of San Francisco is an *inferior court* of limited jurisdiction, whose powers are conferred, and whose duties and modes of procedure are prescribed, by statute, and to which the rule applies that the evidence of its proceedings must affirmatively show jurisdiction of the person of a defendant, and over the subject-matter; and the remark to the contrary, in *Ex parte Murray*, 45 Cal. 455, is *dictum*.—*Ex parte Kearny*, 212.
2. ID.—ID.—ID.—ID.—Where it affirmatively appears from the record of the proceedings of an *inferior court* that a person was tried and sentenced to be punished for an act which is not a crime, the judgment is absolutely void, and a person in custody under such a judgment will be discharged on *habeas corpus*.—*Id.*
3. ID.—CONSTRUCTION OF ORDINANCE.—To constitute an offense under subd. 3, § 28, of Order No. 697, as amended by Order No. 1,196 of the City and County of San Francisco—which provides that "No person shall address to another, or utter in the presence of another, any words * * having a tendency to create a breach of the peace"—the words must be uttered in the presence of the person whom they tend to provoke to such breach of the peace.—*Id.*
4. ID.—ID.—POLICE COURT OF SAN FRANCISCO—INFERIOR COURT—JURISDICTION.—The petitioner was in custody under a judgment of the Police Court of San Francisco, condemning him to six months' imprisonment and the payment of $1,000; and the offense charged in the complaint was, that the petitioner "did willfully and unlawfully utter and address to others, to wit, to a large number of persons then and there assembled * * * certain profane words and language, which words and language then and there had a tendency to create a breach of the peace." But there was no averment that the words were "addressed to, or uttered in the presence of," the person of whom they were spoken. *Held*, that the complaint charged no offense, and that the petitioner was entitled to his discharge.—*Id.*
5. ID.—ID.—ID.—ID.—ID.—A court, (whether superior or inferior) derives its jurisdiction from the law, and its criminal jurisdiction extends only to such matters as the law declares to be criminal; and, when it undertakes to imprison for an offense to which no criminality is attached, it acts beyond its jurisdiction, and the party imprisoned is entitled to his discharge on *habeas corpus*.—THORNTON, J.—*Id.*

See CONTEMPT, 2 and 3.

IMPEACHMENT.

1. IMPEACHMENT OF WITNESS—CHARACTER—EVIDENCE.—A witness, with a view to impeach him, was asked certain questions, (stated below) affecting his moral character. *Held*, that they were rightly ruled out.—*Hinkle* v. *San Francisco & North Pacific Railroad Company*, 627.

INCREASE OF CATTLE. See EVIDENCE, 6.

INDICTMENT.

1. INDICTMENT—LARCENY—BURGLARY.—An indictment, charging an entry into a stable, with intent to commit "larcey," does not describe any offense.—*The People* v. *St. Clair*, 524.

See MURDER, 1.

INFANT. See GUARDIAN AND WARD, 5; MORTGAGE, 1.

INFERIOR COURT. See HABEAS CORPUS, 1, 2, 4, and 5.

INJUNCTION.

1. INJUNCTION—DAMAGES—ATTORNEY'S FEES.—The amount recoverable, on account of attorney's fees, in an action upon an injunction bond, is limited to fees paid counsel for procuring the dissolution of the injunction, and does not extend to fees paid for defending the entire case.—*Bustamente* v. *Stewart*, 115.
2. ID.—ID.—NOMINAL DAMAGES—MAXIM.—In an action upon an injunction bond, after dissolution of injunction, there being no express proof of damages, the plaintiff claimed that they were entitled to judgment for nominal damages; but *held*, that however the general rule might be, the case was a fitting one for the application of the maxim "*De minimis non curat lex.*"—*Id.*
3. INJUNCTION—CLOUD UPON TITLE—EXECUTION SALE.—Where a sheriff's sale, though ineffectual to pass title to a purchaser, would yet be sufficient to cast a cloud upon the plaintiff's title, a Court of Equity will enjoin the sale. —*Porter* v. *Pico*, 165.
4. ID.—ID.—ID.—EXECUTION—ATTACHMENT—SHERIFF'S DEED—EX-SHERIFF—RELATION.—A sheriff's deed, made upon an execution sale under a judgment in an attachment suit, conveyed to the plaintiff all the right, title, and interest of the judgment debtor, which he had *at the date of the docketing of the judgment, or at any time thereafter.* The defendant, who had obtained judgment in an attachment suit, wherein the attachment was levied upon the same land after the attachment, but before the judgment, in the former suit, caused a special execution to be issued to the ex-Sheriff, (who had levied his attachment) requiring him to sell the interest which the judgment debtor had in the land at the date of the levy of the attachment. *Held*, that the plaintiff's deed took effect by relation from the date of the attachment, and conveyed to him the interest which the judgment debtor then had, and that the sale under the defendant's execution would have cast a cloud upon the plaintiff's title, and was therefore rightly enjoined.—*Id.*

See BOARD OF SUPERVISORS.

INSOLVENCY.

1. INSOLVENCY—PARTNERSHIP—CONSTRUCTION OF STATUTE.—Neither the Insolvency Act of May 4th, 1852, or the Supplementary Act of March 31st, 1876, apply to partnerships.—*In re Baker & Hamilton*, 302.
2. INSOLVENCY ACT OF 1876—BANKRUPT ACT—CONSTITUTIONAL LAW.—The existence of the United States Bankrupt Law did not render the Insolvency Act of March 31st, 1876, unconstitutional, but merely postponed its operation; and upon the repeal of the Federal law, the State act became operative in regard to debts arising after its passage, whether arising before or after the repeal of the Federal law.—*Lewis* v. *The County Clerk of Santa Clara County*, 604.
3. INSOLVENT ACT—BANKRUPT ACT—CONSTRUCTION OF CONTRACT.—The operation of the Insolvent Law was suspended by the Bankrupt Act, in the sense that no proceeding could be commenced for a discharge under it, while a general bankrupt law existed; but, upon the repeal of the Bankrupt Act, the Insolvent Law revived, and came again into operation, as if it had never been suspended; and its provisions apply as well to indebtedness contracted while it was suspended, as to indebtedness contracted after it again came into operation.—*Boedefeld* v. *Reed*, 299.

See CHANGE OF PLACE OF TRIAL, 2; MEETING OF CREDITORS.

INSTRUCTIONS.

1. INSTRUCTION.—An instruction is erroneous if there is no evidence tending to establish the hypothesis upon which it is based.—*Perkins* v. *Eckert*, 400.
2. INSTRUCTIONS—CONFLICTING INSTRUCTIONS—REFUSAL OF INSTRUCTIONS.—Certain instructions, discussed by the Court, *held* not to be conflicting, and others *held* to have been properly refused.—*Witherby* v. *Thomas*, 9.
3. INSTRUCTIONS—EXCEPTION—SALE—CHANGE OF POSSESSION—FRAUD AS TO CREDITORS.—The instruction, appearing in the statement, was given by the Court. *Held*, that—in the absence of an exception—the instruction could not be reviewed; and *held further*, that the instruction did not appear to be erroneous or calculated to mislead the jury.—*Chester* v. *Bower*, 46.
4. INSTRUCTIONS—EVIDENCE—CONSTITUTIONAL LAW.—Upon the trial of an indictment for burglary, the Court instructed the jury that the possession of the property by the defendant recently after it had been stolen, unless satisfactorily accounted for by the defendant, raised a presumption of his guilt. *Held*, that the instruction was in violation of the constitutional provision, which prohibits the Court from charging the jury with reference to matters of fact.—*The People* v. *Mitchell*, 236.
5. INSTRUCTIONS—JURY—TRIAL—SALE OF PERSONAL PROPERTY—FRAUD.—In an action for the recovery of personal property, in which the defendant justified the taking, as Sheriff, under an execution against the plaintiff's vendor, the Court instructed the jury that the evidence showed that there was no immediate delivery, nor any actual and continued change of possession under the alleged sale to the plaintiff, and therefore to find for the defendant. *Held*, that the circumstances appearing in the case might perhaps have justified the jury in the finding that there was fraud, or that there was no delivery, or actual or continued change of possession; but that the Court could not, in view of the testimony, say, *as a matter of law*, that the verdict should be for the defendant.—*Parks* v. *Barney*, 239.
6. INSTRUCTIONS—PLEADING—VARIANCE.—In an action in *indebitatus assumpsit*, for work and labor done in and about the defendant's mining claim, between the 6th day of June, 1876, and the 15th day of November, 1877—the complaint alleging in one count a promise to pay, and in another the value of the work—it appeared from the plaintiff's testimony that there was no understanding or agreement as to how much he was to receive, or as to how he was to receive it, prior to July 5th, 1877; but the Court instructed the jury in effect that, if the plaintiff went to work upon the defendant's mining claim, in June, 1876, under an express contract to receive reasonable wages out of the proceeds of his labor on the mine, without looking to the company personally, and after doing preparatory and unremunerative work at considerable expense, was discharged by the defendant, without good cause, before he had taken out reasonable wages, then the defendant was liable to the plaintiff for such reasonable wages: *Held*, that the instruction was a substantial departure from the case made by the pleadings and the evidence, and could not be sustained.—*Sargent* v. *The Linden Mining Company*, 204.
7. INSTRUCTION—BURGLARY—CRIMINAL LAW.—To arrive at the meaning of an instruction of the Court, all the instructions given upon the same point must be considered.—*The People* v. *Kennedy*, 201.
8. ID.—ID.—ID.—INTENT.—Upon the trial of an indictment for burglary, for entering a barn with intent to commit larceny, it was admitted by the defendant that he entered the barn to sleep, and on waking in the morning, saw some harness there, and stole it; and the Court instructed the jury that every sane person is presumed to intend the consequences of his own acts, and that an unlawful act is done with unlawful intent. It was objected to

INSTRUCTIONS (Continued).

this instruction, that it in effect directed the jury that an unlawful intent in entering the barn was to be presumed from the unlawful act of stealing; but *held* by the Court, that in view of the other instruction, cited in the opinion, the jury could not have viewed the instruction as conveying this meaning, and could not have been misled by it.—*Id.*

See CONTRACT, 1 and 9; DELIVERY; MURDER, 7, 8, 9; UNLAWFUL ENTRY, 2.

INSTRUMENT.

1. INSTRUMENT—DEFINITION.—The word instrument, as used in the Codes, invariably means some written paper or instrument signed and delivered by one person to another, transferring the title to, or giving a lien, on property, or giving a right to debt or duty.—*Hoag* v. *Howard*, 564.

INSUFFICIENT FINDING. See FINDING, 6.

INSURANCE.

1. INSURANCE—POLICY—ASSIGNMENT—AGENT.—A policy of fire insurance to P. and E., partners, contained the provision, that upon the conveyance of the property insured, or the assignment of the policy, without the consent of the company indorsed thereon, the policy should be void; and also the further provision, that no agent was empowered to waive any of the conditions of the policy without special authority in writing from the company. The interest of E. in the property insured, and in the policy, was, without the knowledge or consent of the defendant, assigned to the plaintiff; but shortly afterward the local agent of the defendant was informed by the plaintiff of the transfer, and requested to have the proper indorsements made on the policy, which he promised within a day or two to do; and afterward two payments of premium were made by the firm of P. & S.; and also the policy was changed by the agent at the request of the assured, so as to transfer $25 insurance from a stable on the premises to the stock and machinery (the change being made by a writing across the face of the policy). In an action upon the policy for a loss, *held*,

1. That by the express provisions of the policy, the agent had no power to waive any of its conditions.—*Shuggart* v. *Lycoming Fire Insurance Co.* 408.

2. That the transfer by E. of his interest in the property, without the proper consent of the defendant, rendered the policy void as to the interest transferred.—*Id.*

3. That the condition of the policy in regard to the transfer of the property was not waived by the subsequent action of the agent so as to revive the policy.—*Id.*

4. That the payment and receipt of the premium, after the transfer to the plaintiff, did not estop the defendant from claiming a forfeiture.—*Id.*

5. That the Court below erred in instructing the jury, that if the agent knew of the transfer and approved the same, they should find for the plaintiff, as there was no evidence that he knew of it until long after it occurred. —*Id.*

6. That the Court erred also in refusing to instruct the jury, at the instance of defendant, that the promise of the agent to procure an assignment of the policy was not sufficient to entitle the plaintiff to recover, if no further steps were taken to procure the assignment.—*Id.*

INTENT. See INSTRUCTION, 8.

INTEREST. See GUARDIAN AND WARD, 3.

INTERVENTION.

1. INTERVENTION.—In an action to obtain a decree that defendant held certain real property in trust for the plaintiffs, and to compel a conveyance, the appellant filed his complaint in intervention, setting up a mortgage of the premises by the defendant, and a foreclosure and sale to the intervenor. *Held*, that he was entitled to intervene because he was interested in the success of the defendant, and also because he had an interest in the matter in litigation.—*Coffee* v. *Greenfield*, 382.
2. ID.—Any interest in the matter in litigation is sufficient to entitle a party to intervene. The fact that the intervenor might protect that interest in some other way, is immaterial.—*Id.*

See PLEADING, 7.

INVESTMENT. See GUARDIAN AND WARD, 1.

IRREGULARITY. See ATTACHMENT, 7.

JOINDER OF ACTION. PLEADINGS, 3.

JUDGMENT. See APPEAL, 1, 3, and 4; CLAIM AND DELIVERY; EVICTION, 1; MORTGAGE, 5; PROMISSORY NOTE, 4.

JUDGMENT BY DEFAULT. See FICTITIOUS NAME; JUDGMENT ROLL, 3; MECHANICS' LIEN, 6; PARTIES TO ACTION, 1.

JUDGMENT ON THE PLEADINGS. See PRACTICE, 2.

JUDGMENT ROLL. See APPEAL, 3; PRACTICE, 3.

JUDICIAL OFFICERS. See JUSTICES OF THE PEACE.

JURISDICTION.

1. JURISDICTION—JUDGMENT—APPEAL.—If, after acquiring jurisdiction of the parties and the subject-matter, a Superior Court should order judgment for one of the parties without a trial, such judgment would not be "without or in excess of the jurisdiction" of the Court, although it might be erroneous; and in such case the only remedy would be by appeal.—*Clark* v. *Superior Court of Lassen County*, 199.
2. JURISDICTION—JUSTICE'S COURT.—In an action for the recovery of specific personal property, in a Justice's Court, the standard of jurisdiction is "the value of the property," and it would seem, (though in this case *held* unnecessary to decide) that the Justice's jurisdiction for the incidental damages for detention is unlimited; and at all events the demand for damages cannot oust the Justice of jurisdiction, if the value of the property is less than $500.—*Astill* v. *Phillippi*, 265.

See APPEAL, 3; ATTACHMENT, 7; CHANGE OF PLACE OF TRIAL, 2; CONTEMPT, 2 and 3; DISMISSAL OF ACTION, 2; ESTATE OF DECEASED PERSONS, 8 and 9; HABEAS CORPUS, 1, 2, 4, and 5; LARCENY, 2; PROHIBITION, 1, 2; PROMISSORY NOTE, 4; RECEIVER; STATE LANDS, 1; YOSEMITE VALLEY GRANT, 1.

JURY TRIAL. See INSTRUCTIONS, 5.

JUSTICES' COURT. See JURISDICTION, 2.

JUSTICES OF THE PEACE.

1. JUSTICES OF THE PEACE—ELECTIONS—CONSTITUTIONAL LAW—JUDICIAL OFFICERS—DEFINITION.—Justices of the Peace are *judicial* officers within the meaning of the Constitution, art. xxii, § 10, and must be elected at the general election.—*McGrew* v. *Mayor etc. of San José*, 611.

JUSTIFICATION. See ACTIONS FOR PERSONAL PROPERTY, 4; DRUNKENNESS AS.

LACHES. See ESTATE OF DECEASED PERSONS, 3.

LAND. See PAROLE PARTITION OF.

LANDLORD AND TENANT. See ESTOPPEL, 1, 2, and 3.

LAND WARRANTS. See STATE LANDS, 5, 6, 7.

LARCENY.

1. LARCENY—DEFINITION—CRIMINAL LAW.—Upon an indictment against S. and his wife for larceny of money, the evidence for the prosecution showed that the prosecuting witnesses delivered money to S. for Mrs. S., according to a previous understanding with the latter that she should invest the money in stocks for the use of the prosecuting witnesses, and tended to show that the defendants obtained the money without any intention of investing it as agreed, and with the fraudulent intent of converting it to their own use. The Court below refused to advise the jury to acquit on the close of the testimony for the prosecution; and, upon the close of the trial, in effect, charged the jury to find the defendants guilty, if they found that they obtained the money in the manner and with the intent above stated, and, afterwards refused a motion for a new trial based on the ground that the verdict was contrary to the evidence; thus, in effect, deciding that the facts stated constituted larceny. *Held*, not to be error.—*The People* v. *Smallman*, 185.
2. ID.—ID.—ID.—SUPREME COURT—JURISDICTION—QUESTION OF LAW—DEFINITION—CONFLICT OF EVIDENCE—CONSTITUTIONAL LAW.—Under the late Constitution, the Supreme Court had appellate jurisdiction in criminal cases, on questions of law alone; and such a question is presented—where the verdict is complained of as being contrary to the evidence—only where there is no evidence to establish the charge; and not where there is evidence tending to prove it.—*Id.*
3. ID.—EVIDENCE—CRIMINAL LAW—RES GESTÆ.—Upon the cross-examination of a witness for the prosecution, an affidavit made by the witness was offered by the defendant, for the purpose of impeaching her testimony. *Held*, that the circumstances under which the affidavit was made, and the conversation had by the witness with the person at whose instance it was made, were admissible as parts of the transaction.—*Id.*
4. ID.—ID.—ID.—ID.—DECLARATIONS.—Upon the cross-examination of the prosecuting witness, the defendants drew out that the witness had consulted one S. in relation to the transaction out of which the indictment grew, and in part developed what had occurred between them. *Held*, that the plaintiff was entitled to call out all that took place between the witness and S., in the consultation referred to.—*Id.*

See INDICTMENT.

LATENT AMBIGUITY. See EVIDENCE, 13; INDICTMENT.

LEGAL TITLE. See STATUTE OF LIMITATIONS, 1.

LEGISLATIVE GRANT.

1. LEGISLATIVE GRANT—CONSTRUCTION—TIMBER—DEFINITION.—By the Act of Congress of July 1st, 1862, entitled "An Act to aid in the construction of a railroad, etc.," the timber growing on the odd-numbered sections of public

LEGISLATIVE GRANT (Continued).
mineral land of the United States was granted to the Central Pacific Railroad Company of California; and under the term *timber* is included all trees and wood. *Held*, accordingly, that a subsequent patentee of such lands took no title to the timber.—*Carr* v. *The Central Pacific Railroad Co.* 192.

LIEN. See MARITIME LIEN; PATENT; REDEMPTION, 3.

LIBEL AND SLANDER. See COSTS.

LIBRARIAN. See STATE LIBRARY, 2.

LIMITATIONS. See STATUTE OF.

LOCAL ACT. See TRAYLOR ACT, 1.

LOCAL BOARD OF EDUCATION. See TEXT-BOOKS, 2.

LOSS OF MORTGAGED PROPERTY. See DELIVERY.

LYING IN WAIT. See MURDER, 8.

McCLURE CHARTER. See MUNICIPAL CORPORATIONS, 2.

MANAGEMENT OF COMMON SCHOOLS. See TRAYLOR ACT, 2.

MANDAMUS. See CLAIMS AGAINST A CITY, 4, 5, and 6; CONSTRUCTION OF STATUTES, 3.

MAP. See EVIDENCE, 13.

MARKET VALUE OF STOCK. See RESCISSION, 2.

MARRIED WOMAN.

1. MARRIED WOMAN—CONTRACT—PROMISSORY NOTE—MORTGAGE—PRINCIPAL AND SURETIES.—The appellant, to secure the debt of her husband, joined with him in a note, and in a mortgage upon her separate property—having been induced to do so by the representations of her husband that she was to be liable only to the extent of the mortgaged property. The plaintiff also took a collateral agreement from others, to secure any deficiency that might remain after the sale of the mortgaged property; but the defendants were not parties to this agreement. *Held*—in an action to foreclose the mortgage—that the appellant was bound as principal, and that her liability was not affected by the understanding she had with her husband, or by the additional security taken by the plaintiff; and *held further*, that she was liable for any deficiency that might arise upon the sale of the mortgaged premises, and that judgment might be docketed against her for it.—*Alexander* v. *Bouton*, 15.
2. ID.—ID.—ID.—ID.—A married woman, except in relation to her separate property, is, in this State, under a disability to contract; but, as to her separate property, she is considered as a *femme sole*, and may make any contract with relation to it; and where a married woman executes a note, and a mortgage upon her separate property, the promise to pay is to be construed as relating, not only to the mortgaged premises, but to her separate property generally.—*Id.*
3. MARRIED WOMAN—MISTAKE—REFORMATION OF DEED.—A Court of Equity cannot reform the deed of a married woman.—*Leonis* v. *Lazzarovich*, 52.
4. ID.—CONVEYANCE—ACKNOWLEDGMENT.—A married woman can only be di-

MARRIED WOMAN (Continued).

vested of her real estate in the mode prescribed by statute; and the certificate of acknowledgment, (required by §§ 1186 and 1191 Civil Code) are as much an essential part of the execution of the deed as her signature.—*Id.*

MARSHALING. PLEADING, 7.

MASTER AND SERVANT.

1. MASTER—SERVANT.—In an action by an employé for injury incurred in the course of the employment, the Court, at the request of the plaintiff, instructed the jury that "The servant assumes no risks, except such as existed at the beginning of the employment, and such as are incidental to the business." *Held*, that the Court should have added words equivalent to, "or which existed during the course of the employment, of which the employé had knowledge or was bound to have knowledge."—*Sowden* v. *Idaho Quartz Mining Company*, 443.
2. ID.—ID.—DAMAGES—NEGLIGENCE—INSTRUCTION.—Certain instructions defining the liability of master to servant for injury incurred in course of employment *approved*. (The instructions will be found in statement of the case.)—*Id.*

MATERIALITY OF EVIDENCE. See EVIDENCE, 9.

MAY. See CONSTRUCTION OF STATUTES, 1.

MAXIM. See ACTION TO QUIET TITLE, 1; DISMISSAL OF ACTIONS, 1, 2; INJUNCTION, 2.

MECHANICS' LIEN.

1. MECHANICS' LIEN.—Section 1188 of the Code of Civil Procedure (quoted in the opinion) applies only to cases in which one claim is filed against two or more *separate and distinct* "buildings, mining claims, or other improvements owned by the same person," and not to a case where all of the work was performed upon one and the same piece of property, although upon different portions of it.—*Dickenson* v. *Bolyer*, 285.
2. MECHANIC'S LIEN—CONTRACTOR—SALE—DELIVERY.—In an action upon a mechanic's lien, it appeared that the plaintiffs, under a contract with the owner, furnished materials and performed labor upon a building; but that such materials were furnished and labor performed more than sixty days before filing the lien, with the exception of two bolts, which were not used in the construction of the building, but which, (it was claimed and found) had been delivered in pursuance of the contract. *Held*, upon the facts stated in the opinion, that it did not appear that this was the case, and a new trial granted.—*Barrows* v. *Knight*, 155.
3. ID.—QUERY.—Could the plaintiff, under such a contract, in any event, acquire a lien, except for the materials actually used in the construction?—*Id.*
4. MECHANIC'S LIEN—NOTICE—CORPORATION.—Knowledge of a fact, concerning the business or affairs of a corporation, acquired by a director or other agent—unless acquired in the management and conduct of its business—does not constitute notice to the corporation. So *held*, in an action against a corporation and its tenant to foreclose a mechanic's lien, for materials furnished in the construction of a building by the tenant on the leased premises—and alleged to have been furnished with the knowledge of the corporation—where it appeared that a director of the corporation, on one occasion, was present during the construction of the building.—*Lothian* v. *Wood*, 159.

MECHANICS' LIEN (Continued).

5. ID.—BUILDING—STRUCTURE—DEFINITION.—*Held further*—the property upon which a lien was claimed being "a dancing-hall, swings, and seats"—that, at least, neither the swings nor seats were buildings or structures, (within the intent and meaning of §§ 1183 and 1192 of the Code of Civil Procedure) for which the corporation would be chargeable even with notice.—*Id.*
6. ID.—VENDOR'S LIEN—JUDGMENT BY DEFAULT.—The tenant defendant having suffered default, the Court adjudged that the plaintiff was entitled to a vendor's lien for the materials furnished, and that he should have the right to enter upon the premises and to remove and sell the same. *Held*, that the decision and judgment were outside the issues, and against law, and judgment directed to be entered in favor of the plaintiff for a lien upon such interest as the said defendant had in the land at the date of the accruing of the lien.—*Id.*
7. MECHANICS' LIEN—ORIGINAL CONTRACTOR—DEFINITION.—Material-men furnishing materials for the construction of a building under a contract with the owner, and persons directly employed by him to work on the building, are not "*original contractors*," within the meaning of §§ 1187, 1194, Code of Civil Procedure, and therefore must file their claims within thirty days from the completion of the building.—*Sparks* v. *Butte County Gravel Mining Company*, 389.

MEETING OF CREDITORS.

1. MEETING OF CREDITORS—NOTICE—INSOLVENCY PROCEEDINGS.—*Wilson* v. *His Creditors*, 476.

MERITS. See CHANGE OF PLACE OF TRIAL, 1.

MINING CLAIMS.

1. MINING CLAIMS—MINING RULES AND REGULATIONS—CONFLICT OF EVIDENCE—ABANDONMENT.— In an action of ejectment for a mining claim, in which the verdict and judgment was for the defendants, the evidence was conflicting, as to whether the plaintiffs' claim had been staked off and surrounded by a ditch, as required by the mining rules and regulations of the district, and also as to whether the claim had been abandoned; there being, on the latter point, evidence tending to show abandonment, and the plaintiff's own testimony that he had not intended to abandon. *Held*, upon the first point, that compliance with the mining rules, in the particulars specified, was essential to the validity of the claim; and, upon the second, that the evidence of the plaintiff as to his intentions, was not conclusive, but the intention was to be determined from all the facts and circumstances of the case; and, the evidence being conflicting on both points, that the verdict should not be disturbed.—*Myers* v. *Spooner*, 257.
2. ID.—EVIDENCE—ERROR.—On the trial the defendants proposed to examine one of the plaintiffs, (who was a witness) as to admissions, and statements, and acts, made and done by him, before he was a tenant in common with his co-plaintiffs; to which the plaintiffs objected, and the objection was overruled. *Held*, that the ruling could not have injured the plaintiffs, since the record failed to show that any such question ever was in fact asked, or answered by the witness.—*Id.*
3. ID.—RECORD—MISTAKE—LOCATION—NOTICE.—It appeared on the trial, that the District Recorder, in recording the notice of one of the defendants' claims, omitted by mistake, one of the lines, but in fact the lines were distinctly marked on the ground, as required by the mining rules. *Held*, that

MINING CLAIMS (Continued).

the defendants were not bound by the mistake of the Recorder, and that the actual location on the ground was sufficient to impart notice to all comers.—*Id.*

MODIFICATION OF JUDGMENT. See APPEAL, 4.

MISTAKE.

1. MISTAKE—FINDINGS—CONFLICT OF EVIDENCE.—To reform a deed on the ground of mistake, the evidence must be clear and convincing, making out the case to the entire satisfaction of the Court, and not loose, equivocal or contradictory, leaving the mistake open to doubt. *Held*, accordingly, that it might be seriously doubted, in view of the substantial conflict in the testimony, whether a finding of mistake was justified, but the decision placed upon another ground.—*Leonis* v. *Lazzarovich*, 52.

See MARRIED WOMAN, 3.

MOBS OR RIOTS. See CLAIMS AGAINST A CITY.

MORTGAGE.

1. MORTGAGE—ACCEPTANCE—DELIVERY—EXECUTOR—GUARDIAN—TRUSTEE—INFANT.—A testator bequeathed to his niece, A. W., (a minor) the proceeds of certain lands, but provided that the said proceeds might be used to pay a debt of his brother, H. W. (father of A. W.), and that in such case H. W. should give a mortgage upon his farm, to secure the repayment of the money.

An executor and guardian of A. W. was appointed by the will, who was authorized to appoint a successor, and who, after having qualified, resigned his trust, and appointed H. W. as executor and guardian; and H. W. thenceforth acted as such, but without qualifying or receiving letters.

H. W. having come into the possession of the bequest to A. W., and appropriated the same to his own use, executed to her, to secure its repayment, a note and a mortgage upon his farm; and caused the latter to be recorded; but the note and (except for the purpose of being recorded) the mortgage were never out of his possession, and were never delivered to A. W. or to any person for her, otherwise than as above stated; and H. W., acting as guardian, afterward entered satisfaction of the mortgage on the record; but the same was, in fact, not paid.

Afterward H. W. borrowed money of the plaintiff's assignor, and executed another mortgage on his farm to secure it.

In an action to foreclose the latter mortgage, in which A. W. was made a party defendant, *held*, (by the Department) that H. W. never became executor or guardian of A. W.; but that, having received her money, he became her trustee, and that, having spent it, his mortgage to her was valid; and, being for her benefit, that the fact of its being set up in her answer, by her guardian *ad litem*, and relied upon and proved in the case, was sufficient evidence of its delivery and acceptance, and that the satisfaction entered by H. W. was void; and *held further*, (by the Court in bank and on petition for rehearing) that the mortgage was given in compliance with the terms of the will, and that a voluntary acceptance by the infant was unnecessary, since the law compelled her acceptance; that she took under the will, and was bound by its terms.—*Aldrich* v. *Willis*, 81.

2. ID.—EQUITABLE ASSIGNMENT—SUBROGATION—PLEADING—FINDING.—Prior to the mortgage to A. W., H. W. had mortgaged his farm to one H., and this mortgage, by agreement with the plaintiff's assignor, was paid out of the moneys loaned by him, and it was claimed by him that the transaction constituted an equitable assignment of the H. mortgage, and that he was en-

MORTGAGE (Continued).

titled to be subrogated to the rights of H.; but *held* that, as he did not sue as assignee of H., but only to foreclose his own mortgage, the question could not be considered, and that any finding upon the subject was outside of the issues.—*Id.*

3. MORTGAGE—DEED INTENDED AS A MORTGAGE—DEFINITION.—Whether a deed absolute in form is a mortgage, is a question of intention, to be determined from all the facts and circumstances of the transaction, taken in connection with the conduct of the parties after the execution of the deed.—*Montgomery* v. *Spect*, 352.
4. ID.—ID.—PRESUMPTION.—In such cases, in order that the deed be held a mortgage, the central fact to be found is the existence of an indebtedness at the time of the transaction, (forming the consideration of the deed) and a continuation of the relation of debtor and creditor. If this is found, the inference is, that the deed was not made to transfer the title, but to secure the debt.—*Id.*
5. ID.—ID.—EJECTMENT—JUDGMENT.—In an action of ejectment, the defendant set up the defense that a deed from him, under which the plaintiff claimed, was in reality a mortgage; and the Court having found to that effect, the judgment was that the plaintiff, upon the payment of the debt within a specified time, should convey to the defendant, and that if the defendant, within the time specified, failed to pay the debt, the affirmative relief demanded by him should be denied, and his bill asking for the same be dismissed, and upon appeal the judgment was affirmed.—*Id.*
6. MORTGAGE—NOTE—DELIVERY.—*Renken* v. *Bellmer*, 466.

See DELIVERY; MARRIED WOMAN, 1, 2; RECEIVER.

MORTGAGED PROPERTY. See DELIVERY.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—CONSTRUCTION OF THE CONSTITUTION.—Under § 6, art. xi, of the Constitution, cities and counties previously incorporated are subject to or controlled by general laws enacted under the Constitution for the organizations of such governments, but the charters of such cities and towns remain in force in each case, until a majority of the electors of the corporation determine to become organized under general laws, or to frame a charter for their own government.—*Desmond* v. *Dunn*, 242.
2. ID.—ID.—ID.—CONSOLIDATED CITY AND COUNTY GOVERNMENTS—SAN FRANCISCO—THE MCCLURE CHARTER.—By § 7 of the same article the provisions of the Constitution applicable to cities apply also to consolidated city and county governments, and, therefore, the act known as the McClure Charter, even if constitutional, does not apply to the corporation known as the City and County of San Francisco, until a majority of the electors of the corporation, voting at a general election, shall so determine.—*Id.*
3. ID.—ID.—ID.—ID.—ID.—ID.—The provision of § 7 of the same article, that "In consolidated city and county governments of more than one hundred thousand inhabitants there shall be two Boards of Supervisors, or Houses of Legislation," has reference to general laws or charters for the government of such corporations passed subsequently to the adoption of the Constitution; and, therefore, the act of incorporation of the City and County of San Francisco, known as the Consolidation Act, is not in conflict with the provisions of the Constitution, and remains in force by virtue of the first clause of § 1 of the schedule to the Constitution.—*Id.*
4. ID.—ID.—ID.—ID.—ID.—ID.—GENERAL LAWS—DEFINITION.—Sections 6 and 7

MUNICIPAL CORPORATIONS (Continued).

of art. xi of the Constitution evidently contemplated the enactment of general laws providing for *all* corporations for municipal purposes, and not for *some* only; and such laws must be as general as the subject to which they relate. The McClure Charter is, therefore, unconstitutional: 1st. Because it excludes from its operation all municipal corporations, except consolidated city and county governments; and secondly, because it is also limited to municipal corporations having more than one hundred thousand inhabitants, and makes no provision for those having less than that population.—*Id.*

5. ID.—ID.—ID.—GENERAL LAW—CLASSIFICATION—DEFINITION.—The classification provided for in § 6, art. xi of the Constitution, is one that will include all cities and towns. The act in question, therefore, does not comply with this provision.—*Id.*

See CLAIM AGAINST CITY.

MURDER.

1. MURDER—INDICTMENT.—An indictment for murder, which charged that defendants "did feloniously, and unlawfully, and of their malice aforethought, kill and murder J. R., contrary," etc., *held* to be good.—*People* v. *José Maria Alviso and Pacheco Alviso*, 230.

ID.—SEPARATE TRIAL—DISCRETION OF THE COURT.—The defendants in open court waived a separate trial, but afterward, before the jury was sworn, moved for a separate trial. *Held*, that it was in the discretion of the Court to refuse the application.—*Id.*

3. ID.—PRACTICE—BILL OF PARTICULARS.—The defendant is not entitled to a bill of particulars of the evidence relied upon to sustain the indictment.—*Id.*

4. ID.—WITNESS—EVIDENCE.—A woman, who is living with the defendant as his wife, but not married to him, is a competent witness against him.—*Id.*

5. ID.—EVIDENCE.—Upon the trial of an indictment for murder, upon the question as to whether the place of the killing was within five hundred yards of the boundary line of the county of the indictment, the estimate of a witness who had been upon the ground, but who had not actually measured the distance, was admitted. *Held*, not to be error.—*Id.*

6. ID.—CORPUS DELICTI.—It is very seldom that a conviction occurs without a direct proof of the *corpus delicti*, either by eye-witnesses of the homicide, or the subsequent discovery of the body; yet there may be exceptions, as where the body has been consumed by fire, or boiled in potash, or dissolved by acids, rendering it impossible that it should ever be produced, and in such cases the *corpus delicti* may be proved circumstantially or inferentially. *Held*, accordingly, in this case, upon the evidence stated by the Court, that the *corpus delicti* was sufficiently proved.—*Id.*

7. MURDER—INSTRUCTION—DEFINITION.—Upon the trial of an indictment for murder, the Court, in effect, instructed the jury that if the deceased was shot by the defendant from behind, and that the defendant at the time of the shooting was concealed behind a fence, and that there were no words, demonstrations, or hostile acts, at that immediate time, on the part of the deceased, and that the deceased was unconscious that the defendant was so concealed until he was shot, the defendant was guilty of murder. *Held*, that the instruction was erroneous.—*People* v. *Miles*, 207.

8. ID.—ID.—ID.—LYING IN WAIT.—The term "concealed" is not synonymous with "lying in wait." If a person conceals himself *for the purpose of shooting another unawares*, he is *lying in wait;* but a person may, while concealed, shoot another without committing the crime of murder.—*Id.*

MURDER (Continued).

9. ID.—ID.—SELF-DEFENSE.—When a man exercises his right of self-defense, he must be understood to act on the facts as they appear to him; and if, without fault or carelessness, he is misled concerning them, and defends himself correctly according to what he supposes the facts to be, he is justifiable, though the facts are in truth otherwise, and he really has no occasion for the extreme measure.—*Id.*

See EVIDENCE, 12.

NEGLIGENCE.

1. NEGLIGENCE—Negligence is the omission to do something which a reasonable man, guided by those circumstances which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable and prudent man would not do.—*Jamison* v. *San José and Santa Clara Railroad Company*, 593.
2. ID.—COMMON CARRIERS OF PASSENGERS.—Common carriers of passengers are required to do all that human care, vigilance, and foresight can, under the circumstances, in view of the character and mode of conveyance adopted, to prevent accidents to passengers, and they are responsible for any, even the slightest, negligence.—*Id.*

See CONTRIBUTORY NEGLIGENCE; EVIDENCE, 10.

NEGOTIABLE INSTRUMENT.

1. NEGOTIABLE INSTRUMENT—PROMISSORY NOTE—NOTICE OF DISHONOR.—Notice of dishonor of a promissory note may be given verbally.—*Pierce* v. *Schaden*, 406.

NEWLY-DISCOVERED EVIDENCE. See ATTORNEY'S FEE, 2.

NEW TRIAL.

1. NEW TRIAL—CONFLICT OF EVIDENCE.—The evidence in the case held to be conflicting.—*Witherby* v. *Thomas*, 9.
2. NEW TRIAL—DISCRETION OF COURT.—A motion for new trial, upon the ground of insufficiency of the evidence, is addressed to the discretion of the Court, and an order granting a new trial on such ground will not be reversed unless there has been a manifest abuse of discretion.—*Pierce* v. *Schaden*, 406; *Bronner* v. *Wetzlar*, 419.

See ATTORNEY'S FEE, 2; STATEMENT ON MOTION FOR NEW TRIAL; FINDINGS, 5.

NOMINAL DAMAGES. See INJUNCTION, 2.

NON-JOINDER OF PARTY. See PROMISSORY NOTE, 3.

NON-NEGOTIABLE CONTRACT.

1. NON-NEGOTIABLE CONTRACT—ASSIGNMENT.—A non-negotiable contract, indorsed in blank, passes by delivery, and the holder may, after the bringing suit, fill up the indorsement with a special assignment to himself.—*Lucas* v. *Pico*, 126.

NOTICE.

1. NOTICE—CONSTRUCTIVE NOTICE—POSSESSION.—One that takes a mortgage upon land, in the sole and exclusive possession of another, can disprove notice of that other's claim only by showing that he made every proper inquiry in respect to the rights of the possessor, and failed to obtain information; but to have such an effect it must appear that the possession is open and notorious.—*Hellman* v. *Levy and Arpin*, 117.

See SERVICE OF NOTICE; DISTRICT SCHOOL TAX, 2; GRAND JURY, 1, MECHANICS' LIEN, 4; MEETING OF CREDITORS.

NOTICE OF DISHONOR. See NEGOTIABLE INSTRUMENT.

OBJECTIONS TO EVIDENCE. See EVIDENCE, 8.

OFFER. See CONTRACT, 7.

OFFER TO RETURN. See RESCISSION, 1.

OFFICE.

1. OFFICE—VACANCY—SUPERVISOR.—Under § 996 Political Code, an office becomes vacant, *ipso facto*, upon the incumbent ceasing to be an inhabitant of the district (if the office be local) for which he was elected, or within which the duties of the office are required to be discharged; and a successor may be appointed without a previous adjudication that the office is vacant. So *held*, in an action for usurpation of office brought by the People, upon the relation of one who had been duly appointed and qualified as Supervisor of a certain district, against a subsequent appointee of the County Judge to the same office.—*The People ex rel. Tracy* v. *Brite*, 79.
2. ID.—EVIDENCE—ERROR.—*Held further*, in the same action, that it was error to admit in evidence a petition of numerous persons for the appointment of the defendant, wherein it was stated that the relator had ceased to be an inhabitant of the State, and the judgment reversed on that account.—*Id.*

OFFICER.

1. OFFICER—SALARY.—The Act of April 1st, 1876, for the appointment of a State Land Commission, provides that the officers therein named "shall hold their office for the period of three years *from and after appointment by the Governor*," and that they shall, "within thirty days after their appointment," meet and qualify. *Held*, that the Commissioners were entitled to salary from the date of their *appointment*.—*Ball* v. *Kenfield*, 320.

See ELECTION COMMISSIONERS; YOSEMITE VALLEY GRANT, 2.

OFFICIAL BOND.

1. OFFICIAL BOND—SURVEYOR-GENERAL—REGISTER.—In an action upon the official bond of G. as Surveyor-General, (during the years 1871 to 1875) *held*, that neither G. nor his sureties were liable for his malfeasance in the office of Register.—*The People* v. *Gardner*, 304.
2. ID.—ID.—*Held further*, that it was the duty of the Surveyor, under the Political Code, and also under the law existing before the adoption of the Codes, to collect a fee of $5 from each applicant for land, and that his failure to do so was a non-performance of duty, and a breach of his official bond, for which he and his sureties were liable.—*Id.*

ORDINANCE. See HABEAS CORPUS, 3.

ORIGINAL CONTRACTOR. See MECHANICS' LIEN, 7.

PAROLE PARTITION OF LAND.

1. PAROLE PARTITION OF LAND.—It is essential to the validity of a parole partition of land that it shall be fully executed and followed up by a several possession by the parties, or their grantees. Accordingly, a parole agreement for partition held to be void, because of such a character that it could not have been followed by such a possession as the law makes essential to its validity.—*Lanterman* v. *Williams*, 60.

PAROLE TESTIMONY TO EXPLAIN RES GESTÆ. See EVIDENCE, 13.

PART PERFORMANCE. See GIFT.

PARTITION. See PAROLE PARTITION.

PARTIES TO ACTION.

1. PARTIES—JUDGMENT BY DEFAULT.—In an action against several defendants, all of whom were served and defaulted, *held*, that the clerk had no authority to enter judgment against one only.—*Long* v. *Serrano*, 20.
2. PARTY TO ACTION.—In an action to foreclose mechanics' liens against defendants, alleged in the complaint to be partners under the firm name of the San Gorgonio Fluming Co., the San Gorgonio Fluming Co., a corporation, answered, setting up the fact of their incorporation, and alleging title to the property; and judgment was rendered for the sale of the property. *Held*, that the corporation had not been made a party to the suit, and that the judgment as to it was erroneous.—*Rousseau* v. *Hall*; *Reynolds* v. *Hall*; *Bolen* v. *The San Gorgonio Fluming Co.*, 164.

PARTNERSHIP NOTE.

1. PARTNERSHIP NOTE—PLEADING—FINDING.—In an action against partners, upon a promissory note signed by their individual names, and not by the firm-name, the complaint alleged, and the Court found, that the defendants were partners, and that they executed the note. *Held*, there was no sufficient allegation or finding that the note was executed by the makers as partners, or for a consideration which passed to the partnership.—*Freeman* v. *Campbell*, 197.

See INSOLVENCY, 1.

PARTY AGGRIEVED. See APPEAL, 5.

PARTY IN INTEREST. See EVIDENCE, 7.

PARTY OF RECORD. See EVIDENCE, 7.

PASSENGERS. See NEGLIGENCE.

PATENT.

1. PATENT—VENDOR AND VENDEE—CONTRACT FOR SALE OF LAND—SPECIFIC PERFORMANCE—VENDOR'S LIEN—THE BOOTH BILL.—In an action by a vendor of land for a specific performance of the contract, and the enforcement of his lien: *Held*, that the decision of the cause must turn upon the question whether the plaintiff, when he tendered a conveyance of the land to the defendant, had a title thereto such as the parties contemplated at the time they entered into their contract; and *held further*—the question turning upon the validity of the patent discussed in the opinion, and under which the plaintiff deraigned title—that the patent was valid.—*Fletcher* v. *Mower*, 119.

See STATUTE OF LIMITATIONS, 1.

PAYABLE IN THIS STATE. See ATTACHMENT, 1.

PAYMENT. See VOLUNTARY.

PENALTY. See FORECLOSURE OF MORTGAGE.

PENDENCY OF ACTIONS. See EVICTION, 1 and 2.

PERSONAL PROPERTY. See ACTION FOR; INSTRUCTIONS, 3 AND 5.

PETITION. See ESTATES OF DECEASED PERSONS, 8, 9.

PLACE OF TRIAL. See CHANGE OF.

PLEADING.

1. PLEADING—ANSWER—FRAUD.—The answer of defendant, (as set forth below) *held* to be sufficient.—*Smith* v. *Davis*, 26.
2. PLEADING—ASSUMPSIT—COMMON COUNTS—PROMISE—EVIDENCE—VARIANCE—IMMATERIAL ERROR.—The promise to pay, alleged in the common counts in assumpsit, was a mere conclusion of law from the facts stated; and, under the Code, in such cases, (as it is only required to state the facts) an express promise need not be alleged, and, if alleged, need not be proved. Accordingly—where the complaint alleged the pasturing of defendant's cattle on the plaintiff's land, and the value of the pasturage; and also alleged that the plaintiff expressly promised to pay what it was reasonably worth—*held*, that it was not necessary to prove an express promise; and *held, further*—there being no conflict in the evidence as to the pasturing of defendant's cattle on the plaintiff's land—that the admission of incompetent evidence as to an express promise could do no injury, and was, therefore, not ground for reversal.—*De la Guerra* v. *Newhall*, 21.
3. PLEADING—COMPLAINT—JOINDER OF ACTIONS—DEMURRER.—*Held*, that the complaint in this case, being a combination of several independent and distinct causes of action, could not have been sustained had a demurrer been interposed.—*Tompkins* v. *Sprout*, 31.
4. PLEADING—ANSWER—PRACTICE—FINDING.—The answer of one of the defendants failed to deny a material fact alleged in the complaint, but the answer was not demurred to, nor was any motion made for judgment on the pleadings; and the case was tried, as if he, like the other defendants, had sufficiently denied the allegations of the complaint; and the findings were in favor of the defendants generally. *Held*, that it was error in the Court to find in favor of the defendant referred to upon an allegation of the complaint which he did not deny.—*Tracy* v. *Craig*, 91.
5. PLEADING—COMPLAINT.—Where a party relies in his complaint upon a contract in writing, and it affirmatively appears that all the terms of the contract are not set forth in *hæc verba*, nor stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient. So *held*, in an action upon a policy of fire insurance, where the policy, attached to the complaint as part thereof, referred to the application of the assured as forming a part of the policy and as a warranty on the part of the assured, but the application was not attached nor the effect alleged in the complaint.—*Gilmore* v. *The Lycoming Fire Ins. Co.* 123.
6. PLEADING—RELIEF.—It is a cardinal rule that the pleading of the party to whom relief is granted must be sufficient to warrant the relief.—*Sigourney* v. *Zellerbach*, 431.
7. ID.—ID.—INTERVENTION—MARSHALING SECURITIES.—ESCROW.—In an action to foreclose a mortgage, a complaint in intervention was filed, setting up a contract between the plaintiff and the defendant Z. (the mortgagor's grantee); whereby the former agreed to execute to the latter an assignment of the note and mortgage in suit, (and of another note and mortgage) and to place the same, with the instruments assigned, in escrow with one P.; Z., thereupon, to give his notes to the plaintiff for specified sums, and the assignment and instruments assigned to remain in the hands of P. as security for the payment of the notes, until Z. should deliver to him, as collateral security for the notes, certain shares of stock, and then to be delivered to Z.; the complaint in intervention further alleging full performance of the contract by Z., and the conveyance of the mortgaged premises by him, with warranty against incumbrances to the intervenor, and praying that the notes and mortgages be decreed to be delivered up and canceled, or, if the Court held the mortgage to be still in effect, that the stock delivered by Z. to P.

PLEADING (Continued),

should be first sold, and the proceeds applied on the mortgage. Z. answered the original complaint, setting up the same facts as the intervenor, but suffered default to the complaint in intervention. The Court found that such a contract had been made, and that Z. had made and delivered to the plaintiff his notes, and had delivered to P. certain shares of stock of the kind but not of the quantity required by the contract, and that the stock had not been accepted by the plaintiff in satisfaction of the contract, and decreed that the stock should first be sold and the proceeds applied on the mortgage, and that the mortgaged premises should be sold for the balance only. *Held*, that the allegations of the complaint were insufficient to sustain the judgment; and *held, further*, that (without re-reference to the sufficiency of the complaint) the plaintiff had no lien upon the stock, the same not having been accepted by him, and that, therefore, this was not a case for a marshaling of securities in favor of the intervenor.—*Id.*

See ACTIONS FOR PERSONAL PROPERTY, 1 and 4; ATTORNEY'S FEE, 1; CREDITORS, FRAUD AS TO, 1; DIVORCE, 3; INSTRUCTIONS, 6; MORTGAGE, 2; PARTNERSHIP NOTE; STATE LANDS, 4.

POLICE COURT OF SAN FRANCISCO. See HABEAS CORPUS, 1, 2, 4, 5.

POLICY. See INSURANCE.

POSSESSION. See NOTICE; STATUTE OF LIMITATIONS, 3; UNLAWFUL ENTRY, 1, 2.

POWER. See CONTRACT, 5.

PRACTICE.

1. PRACTICE—FINDING—APPEAL.—Upon an appeal from a judgment of the District Court, where there was no finding upon a material issue, *held*, that it would be impracticable to return the case to the Superior Court, with directions to find upon that issue alone.—*Freeman* v. *Campbell*, 197.
2. PRACTICE—JUDGMENT ON THE PLEADINGS—FRIVOLOUS ANSWER—DEFINITION.—A frivolous answer is one which denies no material averment in the complaint, and sets up no defense; and when such an answer is filed, the plaintiff may apply for judgment on the pleadings.—*Hemme* v. *Hags*, 337.
3. ID.—APPEAL—JUDGMENT ROLL—BILL OF EXCEPTIONS.—Upon an appeal from the judgment, where there is no bill of exceptions, the ruling of the Court below on a motion for judgment on the pleadings cannot be reviewed on appeal.—*Id.*

See BILL OF EXCEPTIONS, 1, 2; FICTITIOUS NAMES; FINDINGS, 5; MURDER, 3; PLEADING, 4.

4. CERTIORARI—JUDGMENT.—It seems that upon a writ of *certiorari*, where the decision is adverse to the plaintiff, the regular form of the judgment is to affirm the judgment reviewed.—*Astill* v. *Phillippi*, 265.

PRESUMPTION. See ATTACHMENT, 4, 5; MORTGAGE, 4.

PRINCIPAL AND SURETY.

1. PRINCIPAL AND SURETY—DEFINITION—PROMISSORY NOTE.—One may be a surety only as between himself and his co-promisor, and yet, as to the creditor, both his apparent and actual character be that of principal. So *held*, in an action upon a promissory note, where it appeared that one S. applied to the plaintiffs for a loan, and that they agreed to let him have the money if he would give a note signed by himself and the defendants, as joint and several makers; and the note was so executed; but all the parties knew that

PRINCIPAL AND SURETY (Continued).
the loan was made for the sole benefit of S., and that, as between himself and the defendant, the latter was merely a surety.—*Harlan* v. *Ely*, 340.
See FORECLOSURE SALE, 1, 2; MARRIED WOMAN, 1.

PRIOR POSSESSION. See ACTION TO QUIET TITLE, 3, 4.

PRIVILEGE. See WITNESS.

PRIVY. See STATUTE OF LIMITATIONS, 3.

PROHIBITION.
1. PROHIBITION—JURISDICTION—REMOVAL OF CAUSE TO FEDERAL COURT.—In an action by citizens of the State, against a citizen and an alien, upon a joint and several obligation, (the amount in controversy being over $500) the alien defendant applied to the Court in due form and time, for a removal of the cause to the United States Circuit Court; and, his motion being refused, applied to this Court for a writ of *prohibition*. *Held*, that he was entitled to the writ.—*Sheehy* v. *Holmes*, 485.
2. PROHIBITION—JURISDICTION—MOTION TO DISMISS INFORMATION.—A writ of prohibition will not lie to restrain a Superior Court from passing upon a motion to dismiss an information.—*Wreden* v. *The Superior Court of Stanislaus County*, 504.

PROMISES. See DEPENDENT PROMISES; PLEADING, 2.

PROMISSORY NOTE.
1. PROMISSORY NOTE—CONSIDERATION—BARRATRY.—Information of an outstanding title to land, in the adverse possession of another, constitutes a good consideration for a promissory note, and the sale of such information is not barratrous.—*Lucas* v. *Pico*, 126.
2. PROMISSORY NOTE—RENEWAL—CONSTRUCTION OF CONTRACT.—The maker of a promissory note, dated November 3rd, 1872, indorsed thereon the following promise: "I hereby renew the within note, and promise to pay the same within two years from this date—the object being to prevent a bar within the next two years. P. Van Clief, October 18th, 1876." In an action brought upon the note, June 2nd, 1879, *held*, that the effect of the renewal was to extend the time of payment two years from its date, and that the action was therefore prematurely brought.—*Koutz* v. *Van Clief*, 345.
3. ID.—ASSIGNMENT—ADMINISTRATOR—NON-JOINDER OF PARTIES.—In the same action—the payee being deceased—it appeared that the plaintiff and his sister E. G. (of whom he held a power of attorney) were the sole heirs and distributees of the payee's estate, and that the administrator had assigned the note to the plaintiff. *Held*, that the plaintiff failed to prove that he was the sole owner of the note, and that E. G. should have been joined.—*Id.*
4. ID.—EVIDENCE—RECORD—JUDGMENT—DECREE OF PROBATE COURT—JURISDICTION.—*Held*, also, that the decree of distribution and the letters of administration were admissible in evidence, unaccompanied by the other parts of the record.—*Id.*
5. PROMISSORY NOTE—FRAUD—ASSIGNEE—CONFLICT OF EVIDENCE—FINDINGS.—*Smith* v. *Silsby*, 470.
See GUARDIAN AND WARD, 6; MARRIED WOMAN, 1, 2; NEGOTIABLE INSTRUMENT; PRINCIPAL AND SURETY.

PROVIDED. See ELECTION COMMISSIONERS, 2.

PUBLIC LANDS. See ACTIONS TO QUIET TITLE, 3, 4.

PUBLIC PLACE. See DISTRICT SCHOOL TAX, 2.

PURCHASER IN GOOD FAITH. See SPECIFIC PERFORMANCE.

QUALIFICATION OF VOTER. See CONTESTED ELECTION.

QUANTITY. See DESCRIPTION IN DEED.

QUESTION OF FACT. See NEGLIGENCE.

QUESTION OF LAW. See LARCENY, 2.

RAILROAD.

1. RAILROAD—EJECTMENT OF PASSENGER FOR FAILURE TO PAY FARE—RESCISSION OF CONTRACT.—The plaintiff entered the defendant's cars without procuring a ticket, and handed to the conductor the ticket fare. The conductor thereupon demanded of the plaintiff the additional amount required by the rules of the company to be paid by persons paying on the train, and, on the plaintiff's refusal to pay, ejected him from the cars, and then returned him his money. *Held*, that the conductor had no right to eject the plaintiff without first returning the money which he had paid.—*Bland* v. *The Southern Pacific R. R. Co.* 570.

See RECEIVER.

RATIFICATION. See CONTRACT, 6.

REAL ESTATE. See ESTATES OF DECEASED PERSONS, 3, 4.

RECEIVER.

1. RECEIVER—JURISDICTION—MORTGAGE—DEED OF TRUST—RAILROAD.—The Sacramento and Placerville Railroad Company executed a mortgage or deed of trust upon its property to two trustees, to secure the payment of the principal and interest of certain bonds, and it was provided that upon default in the payment of the principal of the bonds, or upon default for one year in the payment of the interest, the trustees should take possession of the property, and apply the net income to the payment of the principal and interest of the bonds. Default having been made, an action was brought by the surviving trustee to enforce the lien and trust, and to obtain possession of the property, and a receiver was appointed. *Held*, upon an application of the successor in interest of the mortgagor for a writ of prohibition, that the case came within the provision of subdivision 6, § 564 of the Code of Civil Procedure, and that the Court had jurisdiction to make the order.—*Sacramento & Placerville Railroad Company* v. *The Superior Court of San Francisco*, 453.

RECORD. See PROMISSORY NOTE, 4.

RECORD OF DEED. See ATTACHMENT, 3.

REDEMPTION.

1. REDEMPTION—TENANTS IN COMMON.—Where land sold under judgment is embraced in one sale, a redemptioner, having a lien upon a share or part of the land sold, can only redeem by paying the whole of the purchase-money and redeeming the whole of the land; and in such case, he succeeds to the whole interest of the purchaser. Accordingly, where land was sold under a judgment of foreclosure against tenants in common, and redeemed by a judgment creditor of one of the tenants, who in due course received his deed: *Held*, that the redemptioner took the interests of both tenants.—*Eldridge* v. *Wright*, 531.

REDEMPTION (Continued).

2. ID.—ID.—SHARPSTEIN, J., concurring in the judgment, doubted whether the redemptioner had a right to redeem a greater interest in the property sold than that of his judgment debtor; but was of the opinion, as the purchaser did not object to his redeeming the whole property, that the effect of the transaction was to vest in him the whole interest of the purchaser.—*Id.*
3. ID.—ID.—LIEN.—MYRICK, J., dissenting, was of opinion that the redemptioner was subrogated to the rights of his judgment debtor, and thus became the owner of the legal title formerly held by him; and, as to the other tenant, that he acquired an equitable lien upon his interest as security for one-half of the redemption money.—*Id.*
4. ID.—ID.—CASES EXPLAINED—EQUITABLE REDEMPTION—STATUTORY REDEMPTION.—*Kirkman* v. *Dupont*, 14 Cal., was not a case of statutory redemption, but of redemption by junior mortgagees of the interest of one tenant in common from a sale in a foreclosure suit against the tenants in common to which they were not parties. The difference between the cases is explained in *Whitney* v. *Higgins*, 10 Cal. 554, and *Montgomery* v. *Tutt*, 11 id. 317. *Id.*
5. ID.—ID.—ID.—*Erwin* v. *Schriver*, 19 Johns. 379, and *Fischer* v. *Eslamann*, 68 Ill. 78, are on statutes with different provisions from the statute of this State.—*Id.*

REGISTER. OFFICIAL BOND, 1, 2.

REGISTRAR OF VOTERS. See ELECTION COMMISSIONERS, 1, 2.

RELATION. See INJUNCTION, 4; SHERIFF'S DEED, 3.

REMOVAL OF CAUSE TO FEDERAL COURT. See PROHIBITION, 1.

RENEWAL. See PROMISSORY NOTE, 2.

REPEAL OF STATUTE. See TEXT BOOKS, 1.

REPLEVIN. See CLAIM AND DELIVERY.

REPUTATION. See EVIDENCE, 10.

RESCISSION.

1. RESCISSION—OFFER TO RETURN—CONSIDERATION—FRAUD—CONFLICT OF EVIDENCE.—In an action upon two promissory notes given for stock in a mining corporation, the defense was, that the plaintiff was induced to give the notes by false and fraudulent representations of the payee as to the value of the stock and mine; and the Court instructed the jury to the effect that, if the stock was of any value, the defendant must have offered to return it, or the plaintiff would be entitled to a verdict. *Held*, that the instruction was right; and, the evidence being conflicting on this point and the question of fraud, *held*, a verdict in favor of defendant should not be disturbed.—*Fitz* v. *Bynum*, 459.
2. ID.—MARKET VALUE OF STOCK—DEFINITION.—*Held further*, the sales of the stock appearing to have been only such as the operators could induce their neighbors and acquaintances to take at low and varying rates, that such transactions did not give a *market value* to the stock.—*Id.*
3. ID.—VALUE OF STOCK—EVIDENCE.—*Held further*, that the point in controversy was whether the stock had value as the mine then was, and that therefore the Court did not err in rejecting evidence as to what the ore might be made to yield by the erection of certain machinery.—*Id.*

See RAILROAD; VENDOR AND VENDEE, 2.

RES GESTÆ. See CONTEST OF WILL; LARCENY, 3; EVIDENCE, 13.

RESIDENCE. See CONTESTED ELECTION.

RETURN. See ATTACHMENT, 5, 6.

RETURN ON EXECUTION. See SHERIFF'S DEED, 2.

RIGHT. See UNLAWFUL ENTRY, 1, 2.

RIGHT OF WAY.

1. RIGHT OF WAY.—Where one grants land to another, which is wholly surrounded by other land of the grantor, or partly by land of the grantor and partly by land of a stranger, a "way of necessity" arises in favor of the grantee over the land of the grantor.—*Taylor* v. *Warnaky*, 350.

RIOTS. See MOBS OR.

SALARY. See OFFICER.

SALE. See FORECLOSURE OF; INSTRUCTIONS, 3, 5; EXECUTION SALE; MECHANIC'S LIEN, 2.

SALE OF PERSONAL PROPERTY. See INSTRUCTIONS, 5; ACTIONS FOR.

SALE OF REAL ESTATE. See ESTATES OF DECEASED PERSONS, 3, 4, 8, 9; VENDOR AND VENDEE, 1.

SAN FRANCISCO, CHARTER OF.

1. CHARTER OF SAN FRANCISCO—CONSTITUTIONAL LAW.—Section 8, art. xi, of the Constitution—providing that "any city, containing a population of more than one hundred thousand inhabitants, may frame a charter for its own government, etc.—is self-acting, and does not need legislation to give it effect.—*The People* v. *Hoge*, 612.
2. ID.—ID.—ELECTIONS—BOARD OF SUPERVISORS—BOARD OF ELECTION COMMISSIONERS—BOARD OF FREEHOLDERS.—Whatever powers were vested in the Board of Supervisors of San Francisco by the Consolidation Act, or the Political Code, were, under §§ 1, 33, and 34 of the Act of April 18th, 1878, transferred to the Board of Election Commissioners, in express terms; and the authority to cause a Board of Freeholders to be elected to frame a charter, (under the provisions of § 8, art. xi, of the Constitution) is therefore *not* vested in the former body.—*Id.*
3. ID.—ID.—ID.—The only condition imposed by the Constitution to make the election, provided for in § 8, art. xi, of the Constitution, valid, is, that the freeholders must be chosen at a general or special election; and, where there has been such an election, the voice of the people is not to be rejected for a defect, or even a want of notice, if they have in truth been called upon and have spoken.—*Id.*
4. ID.—ID.—ID.—ID.—ID.—ID.—THORNTON, J., dissenting, was of the opinion that the power of fixing the day for holding an election, under the provisions of § 8, art. xi, of the Constitution, was not vested in the Board of Election Commissioners, or in the people acting *en masse*; and that such power, being legislative in its nature, was vested in some authority competent, under the Constitution, to legislate on the subject; and that the election of the freeholders involved in this cause was held without authority, and was void.—*Id.*

SAN FRANCISCO. See POLICE COURT OF.

SELF-CRIMINATION. See WITNESS.

SELF-DEFENSE. See MURDER, 9.

SEPARATE PROPERTY. See DIVORCE, 4.

SEPARATE TRIAL. See MURDER, 2.

SERVICE OF NOTICE. See APPEAL, 6.

SERVICE OF AMENDED COMPLAINT. See FICTITIOUS NAME.

SETTING ASIDE DEFAULT. See DEFAULT.

SET-OFF.

1. SET-OFF—ASSIGNMENT.—Upon a motion by the defendant to set off against a judgment rendered against him, a judgment against the plaintiff assigned to him by another, he must show that he is the absolute and beneficial owner of the judgment, or he cannot set it off.—*Jones* v. *Chalfant*, 505.

SHERIFF. See INJUNCTION, 4.

SHERIFF'S DEED.

1. SHERIFF'S DEED.—It may be regarded as settled in this State that the mis-recital of the execution in an officer's deed will not affect the validity of the deed, if the officer had authority to sell.—*Wilson* v. *Madison*, 5.
2. ID.—RETURN ON EXECUTION.—The title of a purchaser at an execution sale does not depend on the return on the execution.—*Id.*
3. SHERIFF'S DEED—EXECUTION SALE—ATTACHMENT—RELATION.—A sheriff's deed, executed in pursuance of an execution sale, under a judgment rendered in an attachment suit, takes effect from the levy of the attachment. The attachment lien, though merged in the judgment, still exists, so as to confer a priority in the lien of the judgment, and this result is attained, in an indirect way, by applying the doctrine of relation to the series of acts necessary to be done to transfer title to the property attached.—*Porter* v. *Pico*, 165.

See INJUNCTION, 4.

SLANDER. See COSTS.

SPECIAL LAW. See CONSTITUTIONAL LAW.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE OF PAROLE CONTRACT—PURCHASER IN GOOD FAITH—CONFLICT OF EVIDENCE—FINDINGS.—*Jones* v. *Bryan*, 478.

See CONTRACT, 7; GIFT; PATENT.

SPECIFICATIONS.

1. SPECIFICATIONS—STATEMENT ON MOTION FOR NEW TRIAL.—Specifications, in a statement on motion for new trial, "that the first finding is not sustained by the evidence," "that the second finding is not sustained by the evidence," etc., *held*, (with reference to the findings cited by the Court) to be insufficient.—*Eddelbuttel* v. *Durrell*, 277.

SPRINKLING STREETS. See CONSTRUCTION OF CONTRACT, 3.

STATE LANDS.

1. STATE LANDS—CONTEST—JURISDICTION.—The judicial department of the State has no jurisdiction of a contest between opposing applicants for the

STATE LANDS (Continued).

purchase of State lands, unless it has been specially referred to a Court by the Surveyor-General, or Register of the State Land Office, under § 1514 of the Political Code; and, as a jurisdictional fact, the order must be proffered or averred in the complaint, and proved.—*Danielwitz* v. *Temple*, 42.

2. STATE LANDS—CONSTRUCTION OF STATUTE.—Act of March 27th, 1872, for the relief of purchasers of State lands, was retrospective in its operation, and did not apply to future cases. *Held*, accordingly—where a defective application for the purchase of State lands was made before, but the certificate of purchase was issued, and payment for the land made, after the passage of the act—the application was not cured by the act.—*Johnson* v. *Squires*, 103.
3. ID.—ID.—CONSTITUTIONAL LAW.—By § 3 of art. xvii of the Constitution, "lands belonging to this State which are suitable for cultivation, shall be granted only to *actual settlers*," and this provision operates as well on applications made before, as those made after the Constitution took effect.—*Id.*
4. STATE LANDS—CONTEST—PLEADING.—In an action to determine a contest arising in the Surveyor-General's or Register's office, each party must allege facts sufficient to show that he is entitled to the issue of a certificate to him.—*Wright* v. *Langenour*, 280.
5. ID.—APPLICATION TO PURCHASE—LAND WARRANTS.—An application to purchase State lands by the location of school land warrants, made subsequent to the Act of April 27th, 1863, is not invalid for want of the affidavits required by that act—such applications being expressly excepted from the operations of the act by the proviso in the second section.—*Id.*
6. ID.—ID.—ID.—DEPUTY.—Upon such an application, certain affidavits required by the Act of April 23rd, 1858, (as amended by § 7 of the Act of April 22nd, 1861) were made before a person signing the *jurat* as "Deputy Locating Agent." *Held*, that the administration of an oath is a function ministerial in its nature, and the State Locating Agent, as a ministerial officer, had power to appoint deputies.—*Id.*
7. ID.—ID.—ID.—ID.—ESTOPPEL.—Upon the application of the defendant, one J. P., as Deputy State Locating Agent, under appointment made by the State Locating Agent, made application to the Register of the Land Office, on behalf of the State of California, for the land in controversy; and in pursuance of that application the land was listed to the State. Afterward the plaintiff made his application. *Held*, that he was estopped from denying the authority of the Deputy Locating Agent.—*Id.*
8. STATE LANDS—SURVEY—DEFINITION.—Sixteenth and thirty-sixth sections are deemed to be *surveyed*, for the purposes mentioned in § 3495, Political Code, only when the plat of the survey of the township has been approved by the United States Surveyor-General.—*Medley* v. *Robertson*, 396.
9. ID.—ID.—CASE OVERRULED.—*Dictum* to the contrary in Oakley v. Stuart, 52 Cal. 522, overruled.—*Id.*
10. ID.—ID.—APPLICATION TO PURCHASE.—The title to a particular 16th or 36th section does not vest in the State before the plat of the survey of the township has been approved by the United States Surveyor-General; and an application to purchase such land, made before the approval of the survey, is unauthorized and void.—*Id.*

See STATUTE OF LIMITATIONS, 1.

STATE LIBRARY.

1. STATE LIBRARY—TRUSTEES.—The Board of Trustees of the State Library are authorized to draw from the State treasury, at any time, all the moneys

STATE LIBRARY (Continued).

therein belonging to the library fund.—*Board of Trustees of the State Library* v. *D. M. Kenfield*, 488.

2. ID.—ID.—LIBRARIAN—BOARD OF EXAMINERS—CLAIMS—DEFINITION.—Bills for books purchased for the State Library are not *claims* within the meaning of § 660 of the Political Code, and need not be presented to the Board of Examiners.—*Id.*

STATEMENT ON MOTION FOR NEW TRIAL.

1. STATEMENT ON MOTION FOR NEW TRIAL—ENGROSSMENT.—The statement on motion for new trial, and amendments, as allowed by the Court, must be engrossed into one, and authenticated by the signature of the Judge, in order to be regarded as the statement required by law, and to be considered on appeal. Accordingly, the Court, upon the ground that the statement was not engrossed, affirms the order of the Court below.—*Smith* v. *Davis*, 26.

2. STATEMENT ON MOTION FOR NEW TRIAL—EXTENSION OF TIME—BREACH OF CONTRACT—DAMAGES.—*Poulson* v. *Hoskins*, 468.

See SPECIFICATIONS.

STATUTES. See CONSTRUCTION OF; STATUTE OF ENROLLMENTS; STATUTE OF LIMITATIONS; STATUTE OF USES; TEXT BOOKS, 1.

STATUTES, CITATIONS OF.

STATUTES OF CALIFORNIA.

1851	464, 141	cited p.	579	1871	174	cited p.	355
1852	p. 66	"	302	1871	533	"	513
1858	235	"	325	1871	587	"	123
1858	248	"	282	1872	622	"	104
1861	ch. 5, § 74, p. 552	"	218	1875	316	"	484
1862	p. 98	"	326	1877-8	163	"	600
1863	§ 1, subd. 3, p. 543	"	218	1877-8	299	"	616
1866	p. 771	"	326	1880	80	"	552
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§ 73, cited	p. 580	§ 243-4-5-6-7, cited	p. 582
§ 128, cited	582	§ 154, cited	582
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PROBATE ACT OF 1851.

§ 131, cited	p. 579	§ 141, cited	579

STATUTES AT LARGE (U. S.)

1863-4 p. 325 ..... cited p. 520

REVISED STATUTES (U. S.)

1876-7 p. 267 ..... cited p. 122

NEW YORK CODE.

§ 132, p. 175.

See CODE CITATIONS; CONSTITUTION, CITATIONS OF.

STATUTE OF ENROLLMENTS.

1. STATUTE OF ENROLLMENTS.—The Statute of Enrollments (27 Henry 8, ch. 16) has never been in force in this State.—*Chandler* v. *Chandler*, 267.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS—PATENT—LEGAL TITLE—STATE LANDS.—In a suit for the recovery of land, after the issuance of the patent, the Statute of

STATUTE OF LIMITATIONS (Continued).

Limitations cannot be held to have commenced running prior to the date of the patent.—*Manly* v. *Howlett*, 94.

2. STATUTE OF LIMITATIONS—GIFT—EQUITABLE TITLE—ADVERSE POSSESSION.—A gift may be made of real estate, if possession is given and taken under the gift, and acts done by the donee to carry out the purpose of the gift. In such case the donee acquires the equitable title, and is entitled to a specific performance; or he may, by adverse possession, acquire the legal title. —*Bakersfield Town Hall Association* v. *Chester*, 98.

3. ID.—SUCCESSIVE POSSESSION—PRIVY.—Several parties signed an agreement to form a joint-stock company to build a public hall and Odd Fellows' Lodge, in the town of Bakersfield, and, a parole gift of land having been made to them for the purpose, they took possession thereof, and commenced building. Afterward, a corporation was formed, in pursuance of the agreement, to which the possession was transferred. In an action of ejectment, by a corporation, in which it appeared that there had been a continuous adverse possession by the parties signing the written agreement, and the corporation, for more than five years before the ouster, *held*, that the plaintiff was entitled to recover.—*Id.*

See CONVERSION; EJECTMENT, 2; ESTATES OF DECEASED PERSONS, 4; ESTOPPEL, 3.

STATUTE OF USES.

1. STATUTE OF USES.—*Query*, whether the Statute of Uses, (27 Henry 8, ch. 10) was ever in force in this State.—*Chandler* v. *Chandler*, 267.

See ACTIONS TO QUIET TITLE, 2.

STATUTORY REDEMPTION. See REDEMPTION, 4.

STAY OF EXECUTION. See DISMISSAL OF ACTION, 2.

STAY OF PROCEEDINGS. See CLAIMS AGAINST A CITY, 5, 6.

STIPULATION. See DISMISSAL OF ACTION, 1, 2, 3.

STRUCTURE. See MECHANICS' LIENS, 5.

SUB-CONTRACTOR.

1. SUB-CONTRACTOR—One who contracts with another for the building of a house, does not thereby incur any liability to the sub-contractors of the original contractors, except such as may be fastened upon him by proceedings under the Mechanics' Lien law; and therefore, where there has been no assignment, or novation of the contract, an action cannot be maintained, (otherwise than under the Mechanics' Lien law) by a sub-contractor against the owner, for work and labor done and materials furnished in the construction of a building.—*Downing* v. *Graves*, 544.

SUCCESSIVE POSSESSION. See STATUTE OF LIMITATIONS, 3.

SUNDAY ACT. See CONSTITUTIONAL LAW.

SUPERVISORS. See OFFICE, 1.

SUPREME COURT. See LARCENY, 2.

SURETY. See ATTACHMENT, 7; PRINCIPAL AND SURETY; VOLUNTARY PAYMENT, 1, 2.

SURVEYOR-GENERAL. See OFFICIAL BOND, 1, 2.

TAX DEED. See ASSESSMENT, 2, 3, 4; DISTRICT SCHOOL TAX.

TAX SALE.

1. TAX SALE—CONSTRUCTION OF STATUTE.—Under a judgment in a tax suit, in favor of the People against an undivided interest, equal to 55,344 acres, in certain real estate, the Sheriff sold an undivided interest, equal to 5,000 acres, for the amount of the judgment and costs—including in the latter fifty cents for filing with the Recorder a duplicate certificate of sale—the interest sold being the smallest undivided interest that any purchaser would take and pay the amount demanded. In an action to quiet title, brought by the original owner of the land against defendants holding under the sale: *Held*, 1st, that the provision of § 8 of the Act of May 12th, 1862, (Hitt. art. 6479) that no more of the property should be sold than was necessary to pay the judgment and *costs*, authorized the Sheriff to include the *accruing* costs in the amount for which the sale was made, and that the fifty cents for filing the duplicate certificate of sale was rightly charged; and 2nd, that the property assessed and directed to be sold, being an undivided interest, a specific tract could not be sold, and the Sheriff was therefore authorized to sell an undivided interest. *Held, further*, objection being made to certain recitals in the sheriff's deed, that, as the statute did not provide for the form of the deed in such cases, the objectionable matter was mere surplusage, and did not affect the validity of the deed.—*Harper* v. *Rowe*, 132.

TAX SUIT. See ASSESSMENT, 1.

TENANT IN COMMON. SEE REDEMPTION, 1.

TERMS OF OFFICE. See YOSEMITE VALLEY GRANT, 2.

TESTIMONY. See EVIDENCE, 8.

TEXT BOOKS.

1. TEXT BOOKS—COMMON SCHOOLS—CONSTITUTIONAL LAW—REPEAL OF STATUTE. Section 7, art. ix, of the Constitution, providing that "the local Boards of Education, and the Boards of Supervisors and County Superintendents of the several counties which may not have County Boards of Education, shall adopt a series of text-books for the use of the common schools within their respective jurisdictions," is self-executing, and operated as a repeal of the Act of December 13th, 1875, which provided that the text-books in use in the years 1873-4-5 should be continued in use until otherwise provided by statute.—*The People ex rel. Beckwith* v. *The Board of Education of Oakland*, 331.
2. ID.—LOCAL BOARDS OF EDUCATION—DEFINITION.—Each Board of Education, whether of a city and township, or county, is local as to the territory of its jurisdiction, and where portions of a county are subject to local boards, the County Board is local as to the balance of the county.—*Id.*
3. ID.—COMMON SCHOOLS—CONSTITUTIONAL LAW—COUNTY SUPERINTENDENT—BOARDS OF SUPERVISORS.—A question stated as to how the powers of the County Superintendents and Boards of Supervisors are to be executed, in cases where the selection of the text-books devolves upon them; and *held*, that as to such cases, the section may not be self-executing, and we might thus have a section self-executing as to one class of officers, and not so as to another.—*Id.*

THREATS. See EVIDENCE, 12.

TIMBER. See LEGISLATIVE GRANT.

TITLE. See STATUTE OF LIMITATIONS, 2; VENDOR AND VENDEE, 1.

TRAYLOR ACT.

1. THE TRAYLOR ACT—CONSTITUTIONAL LAW—LOCAL ACT—DEFINITION.—The act approved April 2nd, 1880, entitled "An act to add a new section to the Political Code, to be known as section 1618, relating to salaries of school teachers in cities having 100,000 inhabitants or more," is *local* in its character, and therefore unconstitutional.—*Earle* v. *The Board of Education of San Francisco*, 489.
2. ID.—ID.—MANAGEMENT OF COMMON SCHOOLS—DEFINITION.—The fixing of the salaries of teachers is a part of the *management* of the schools, and comes within the meaning of that term as used in subd. 27, § 25, art. iv of the Constitution.—*Id.*
3. ID.—ID.—AMENDMENT—DEFINITION.—The act referred to is not an amendment of the Political Code.—*Id.*

TRESPASS DE BONIS ASPORTATIS. See ACTIONS FOR.

TRIAL. See INSTRUCTIONS, 5; PERSONAL PROPERTY, 1.

TRUST. See CONTRACT, 7; YOSEMITE VALLEY GRANT, 1.

TRUST FUND. See GUARDIAN AND WARD, 6.

TRUSTEE.

1. TRUSTEE—FIDUCIARY—ADMINISTRATOR'S SALE—CONSTRUCTIVE FRAUD.—For its views upon the main question involved in the case the Court refers to the opinion in *Tracy* v. *Colby*, 55 Cal. 67.—*Tracy* v. *Craig*, 91.
2. TRUSTEE—FIDUCIARY—ADMINISTRATOR'S SALE—CONSTRUCTIVE FRAUD.—A judge, who orders a sale, and has the power to confirm or set it aside, comes within the reason of the rule that trustees, strictly so called, and other fiduciaries, cannot make a valid purchase of any part of the estate, in respect to which they have duties to perform.—*Tracy* v. *Colby*, 67.
3. ID.—ID.—ID.—ID.—EVIDENCE—DECLARATIONS.—H. purchased land at an administrator's sale, and, on the day he received his deed, conveyed an undivided half of the land to C., the Probate Judge, who ordered and confirmed the sale, the latter paying therefor one-half of the purchase-money paid by H. In an action brought by the heirs of the intestate against H. and C.—the complaint alleging that the sale to C. was made in pursuance of an agreement, or understanding, between him and H., entered into prior to the administrator's sale—*held*, that the declarations of H., made prior to the sale, but in the absence of C., that he was about to purchase for the benefit of himself and C., were admissible in evidence.—*Id.*
4. ID.—ID.—ID.—ID.—FINDING.—In the case stated, the Court found that H. conveyed to C. upon a contract and agreement, made on the day of the sale, and not in pursuance of any fraudulent contract made prior thereto. *Held*, that the finding is defective, as it does not negative the allegation that there was such a prior contract, but simply expresses the opinion of the Court that it was not fraudulent.—*Id.*

See CONTRACT, 5, 6; GUARDIAN AND WARD, 6; MORTGAGE, 1; STATE LIBRARY, 1.

UNDERTAKING. See APPEAL, 7; ATTACHMENT, 7.

UNDUE INFLUENCE. See CONTEST OF WILL.

UNIVERSITY OF CALIFORNIA. See CONSTRUCTION OF STATUTES, 3.

UNLAWFUL ENTRY.

1. UNLAWFUL ENTRY — POSSESSION — COLOR OF RIGHT.—Actual possession is *prima facie* evidence of title in the possessor, and is protected by the law against lawless invasion without right or color of right. An entry upon such possession cannot be made in good faith, unless it is made upon some right, or color of right, or claim of legal right, to make the entry; and such claim of right must exist before the entry to constitute good faith.—*Phenix Mill and Mining Co.* v. *Lawrence*, 143.
2. ID.—ID.—ID.—INSTRUCTIONS.—In an action for unlawful entry, (under § 1160 Code Civ. Proc.) it appeared that the defendants entered upon the mining claim of the plaintiff, under the claim that the plaintiff's location was void, and with the purpose of themselves locating it; and the Court instructed the jury that if the defendants entered peaceably and in good faith, under claim, or color of title, or in good faith believing themselves to be the true owners, they were entitled to a verdict; but that a party cannot enter for the purpose of obtaining title or color of right, but must have it before he entered; and refused to instruct the jury, at the instance of the defendant, that if the defendants entered upon the mines peaceably and in good faith, believing that they were open to location, then the entry was not unlawful. *Held*, that there was no error.—*Id.*
3. ID.—EVIDENCE—GENERAL BELIEF.—*Held further*, that the Court properly ruled out the following question: "Do you know what the *general belief* was with reference to those mines; as to whether they were abandoned or not?" —*Id.*

UNPROFESSIONAL CONDUCT. See ATTORNEY, DISBARRING OF, 1.

USES. See STATUTE OF.

VACANCY. See OFFICE.

VALUE. See CLAIM AND DELIVERY.

VALUE OF STOCK. See RESCISSION.

VARIANCE. See CONTRACT, 8; INSTRUCTIONS, 6.

VENDOR AND VENDEE.

1. VENDOR AND VENDEE—SALE OF LAND—FAILURE OF TITLE.—An agreement to sell land, and, upon the payment of the purchase-money, to execute a good and sufficient deed therefor, requires of the vendor to convey to the vendee the *title* to the land, and is not satisfied by the tender of a deed sufficient *in form*, when the vendor has, in fact, no title to convey.—*Haynes* v. *White*, 38.
2. ID.—ID.—ID.—CONTRACT—RESCISSION.—A vendee cannot maintain an action to recover his purchase-money from a vendor, who has failed to perform his contract, until he has been evicted, or has surrendered or offered to surrender the possession.—*Id.*

See PATENT.

VENDOR'S LIEN. See PATENT.

VENUE. See CHANGE OF PLACE OF TRIAL.

VOLUNTARY PAYMENT.

1. VOLUNTARY PAYMENT—SURETY—CONTRIBUTION.—No man can be made a debtor for money paid to his use, unless it was done at his request, or unless the party paying the money was bound as surety, or otherwise, to pay it for him.—*Curtis* v. *Parks*, 106.

VOLUNTARY PAYMENT (Continued).

2. ID.—ID.—ID.—CONSTRUCTION OF CONTRACT.—The plaintiffs, and defendant, and others—who were sureties on the bond of a Public Administrator—promised and agreed to pay to one F.—to whom their principal had become liable, as his successor in the administration of an estate—the amount of the liability; promising and agreeing each with each and all the others, that they would so pay in certain definite proportions. The plaintiffs, having paid the whole amount, brought their action against the defendant to recover the amount that he should have paid. *Held*, that under the contract alleged there was no obligation resting upon the plaintiffs to pay the defendant's part of the amount, and therefore their payment was voluntary, and gave rise to no cause of action against the defendant.—*Id.*

VOTERS. See ELECTION COMMISSIONERS, 1, 2.

WARD. See GUARDIAN AND.

WATER COMPANY. See CONSTRUCTION OF CONTRACT, 3,

WILL. See CONTEST OF; GUARDIAN AND WARD, 4.

WITNESS.

1. WITNESS — SELF-CRIMINATION — PRIVILEGE.— If a witness discloses a part of a transaction, with which he was criminally concerned, without claiming his privilege, he must disclose the whole. He cannot, after voluntarily testifying in chief, decline to be cross-examined on the ground that his answers may criminate or disgrace him.—*The People* v. *Freshour*, 375.

See IMPEACHMENT OF; EXCLUSION OF; EVIDENCE, 11; MURDER, 4.

YOSEMITE VALLEY GRANT.

1. YOSEMITE VALLEY GRANT—TRUST—CHARITY—JURISDICTION.—By the act of Congress of June 30th, 1864, the United States granted the Yosemite Valley to the State of California, and in accepting the grant the State assumed certain obligations in the nature of a trust; but the act and the statute of the State accepting the grant did not operate as a gift for charitable uses, such as may be regulated, directed, and enforced by a Court of Equity; nor can the obligations of the State be enforced by the courts of the State.—*The People* v. *Ashburner*, 517.
2. ID.—COMMISSIONERS—OFFICER—DEFINITION—TERMS OF OFFICE.—The commissioners to manage the Yosemite Valley, and the Mariposa Big Tree Grove, are mere agents of the State, and persons thus clothed with functions affecting the public, assigned to them by State laws, are *officers* of the State, and their terms of office expired four years after their appointment.—*Id.*
3. ID.—CONSTITUTIONAL LAW.—The Act of April 15th, 1880, "for the management of the Yosemite Valley, and the Mariposa Big Tree Grove," is not unconstitutional.—*Id.*